COMMITTEE TO REVIEW PART 1
OF THE TRADE UNION ACT,
PROVINCE OF NOVA SCOTIA

REPORT

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1. INTRODUCTION

On October 1, 1984, the Honourable David Nantes, Minister of Labour and Manpower, appointed an eleven-member Committee to review Part I of the Trade Union Act of Nova Scotia. The Minister, in a letter to the Chairman of October 1, 1984, set forth the mandate of the Committee in the following terms:

> "The Mandate for you and the Committee will be to examine the Trade Union Act, Part I, i.e., the non-construction segment, in order to recommend methods by which improved labour management relations can be achieved. Since this will be the first review since the 1972 amendments, I believe that your Committee will be able to develop a full agenda of items for discussion.
>
> As you will note from the attached list, the membership of your Committee was selected subsequent to discussions with a number of groups including the Nova Scotia Federation of Labour, the Canadian Manufacturers' Association, the Halifax Board of Trade, the Nova Scotia Association of Health Organizations, the Union of Nova Scotia Municipalities, and the Canadian Federation of Independent Business. This diversity of interests should result in excellent discussions of all ideas presented to the Committee, and should then, hopefully, result in a consensus for improving our labour management climate in this province."

The members of the Committee are:

Greg Blanchard
President
Nova Scotia Government Employees Union

George Boudreau
Regional Vice President
Canadian Brotherhood of Railway, Transport and General Workers

Douglas Carter
Mayor of Truro

Christopher L. A. Clarke
Secretary and Director of Public Relations
Bowater Mersey Paper Co. Ltd.

Robert Cook
Director of Labour Relations
N. S. Association of Health Organizations

Warren Horne
President
Industrial Marine Products Ltd.

John Kane
National Representative
Energy & Chemical Workers Union

Brian Matheson
Financial Secretary & Business Manager
International Brotherhood of Electrical Workers, Local 1928

Peter O'Brien
Director Provincial Affairs - Atlantic Canada
Canadian Federation of Independent Business

Tom Pickford
International Representative
Retail, Wholesale & Department Store Union

At the initial meetings of this Committee an agenda of items of interest to the various constituent groups was formulated. In addition, there was extensive discussion as to whether it would be appropriate to hold a series of public meetings throughout the province to receive submissions from interested individuals and groups.

It was the determination of the Committee, based upon the broad representational group from which it was formulated, that a more expeditious and effective method of gaining the views of those interested in the process would be by way of written briefs as opposed to public hearings.

Therefore, a call for written briefs went out on the 19th day of December, 1984. This request for briefs was published in thirty-three (33) newspapers of both a daily and weekly nature covering all areas of the province. Attached to this Report as Appendix "A" is a list of the newspapers in which this notice appeared. As a result of this call for submissions some twenty (20) written briefs were received. Those briefs are listed in Appendix "B" hereto.

While all of the items in each of the briefs may not be specifically referred to in this report, the authors thereof can be assured that each and every brief was given full and serious consideration by the entire Committee.

There may be some concern that the recommendations contained in this report have been formulated without public hearings. It is the wish and expectation of this Committee that its report, which contains recommendations only, should be the subject of full and open public debate. It is only through that process that the conclusions reached by this Committee can be tested to determine whether they are valid in the current labour relations context in the Province of Nova Scotia. The Committee welcomes and invites comments in respect of any part of this report.

2. HISTORICAL BACKGROUND

There has been a tradition of the organization of working men and women into trade unions present in the Province of Nova Scotia for many years. Indeed, some authors place the first union in Canada, in approximately 1800, as having been founded in Dartmouth among shiprights and caulkers of that town.[1] Other early efforts at unionization occurred around the time of Confederation among the masons, railway engineers, and printers in Halifax.

The earliest legislation regulating the activities of trade unions and employers in Nova Scotia concerned labour relations in the coal industry. Of particular interest is one of the earliest pieces of legislation dealing with the arbitration process, The Miners Arbitration Act, introduced in the Nova Scotia Legislature in 1888 and passed the following year.[2]

The Trade Union Act 1937 made it lawful for employees to form themselves into unions, to join the unions which had been formed, and to bargain collectively with their employer. It focused on the right of the employees to organize and did not provide for mediation, arbitration, or conciliation services. This lack was partially filled by The Conciliation Services Act (S.N.S. 1941, c. 13), which authorized and empowered the Minister of Labour to act as a mediator and to appoint a Commissioner or Commissioners of Conciliation in labour disputes whenever,

in the opinion of the Minister, it was required in the interests of industrial peace.

These two acts were further supplemented by the Wartime Labour Relations (Nova Scotia) Act (S.N.S. 1944, c. 8), which was enacted to administer regulations in accordance with the terms of an agreement entered into between the Dominion of Canada and the Province of Nova Scotia. The agreement made Dominion regulations applicable in employment in which industrial relations had been previously a provincial matter as well as in the industries returned to provincial jurisdiction for these purposes. All three of these Acts were repealed by the Trade Union Act (S.N.S. 1947, c. 3).[3]

However, the first piece of labour legislation in the form with which we are currently familiar was The Wartime Labour Relations (Nova Scotia) Act 1944. The evolution from The Wartime Labour Relations (Nova Scotia) Act to the current Trade Union Act is canvassed in the recent text by George W. Adams, Canadian Labour Law, A Comprehensive Text (Canada Law Book Inc., 1985):

> "In 1947 The Trade Union Act incorporated most of the features found in the Dominion wartime regulations, as well as some from the Nova Scotia Trade Union Act of 1937. Like the wartime regulations, the Act provided for compulsory collective bargaining and for the settlement of disputes arising from the

collective agreement, and prohibited strikes and lockouts during the term of the collective agreement. It prohibited discrimination towards employees who were union members or changes in terms of employment until 14 days after the report of the conciliation board had been received. It also provided that an employers' organization or trade union could be prosecuted in its own name for an offence under the Act. Like the 1937 Trade Union Act, the new Act required the union to file its constitution, by-laws and financial statements with the Minister, and provided for voluntary check-off of union dues. One provision unique to this legislation was a clause allowing the employer to explain its side of a dispute to the employees directly, by mail or by bulletin board.

* * *

In 1948 changes were made to the Trade Union Act to make it more uniform with the federal Industrial Relations and Disputes Investigation Act. A new provision was added to allow for reinstatement and compensation of employees for unfair dismissal. Omitted from the Act was the section which permitted the employer to present its view point to the employees.

Changes were made in 1949 to the certification procedure. If a representation vote was taken, the outcome was to be decided by the majority of those voting, as long as at least 60 per cent of the employees participated, rather than by the majority of the employees entitled to vote. Formerly there was no revocation procedure. This amendment provided the Board with the power to revoke certification after 10 months. Another amendment required two different procedures to be followed for dues check-off, depending on whether the union had been certified or voluntarily recognized.

In 1957 several amendments were added. The Labour Relations Board was given the opportunity to state a case in writing for the opinion of the Supreme Court of Nova Scotia, if it so chose. A new provision forbade the alteration of any working conditions while an application for certification was pending before the Board, and the employer could not increase or decrease wages without the employees' consent once notice to commence bargaining had been given by a certified union.

The next amendments to the Act occurred in 1964. The procedure for handling unfair labour practices changed. Now the Board, rather than the Minister, was responsible for the complaints and the remedies. After this Act was passed, the two parties could insert a preferential hiring clause into the collective agreement, but as in the legislation of other provinces, there continued to be a provision that prohibited the inclusion of a clause requiring employers to discharge an employee solely because he or she belonged to a union other than the one party to the agreement. Another provision clarified an employer's right to make its position known to the employees. The Act stated that while an employer could not interfere in the formation of a union, there was nothing to prevent an employer from expressing its views so long as it did not use coercion, intimidation, threats or undue influence. At this time as well, appointment of a conciliation board was made conditional upon the request of both parties. This meant a more active role for the conciliation officer.

In 1965 Nova Scotia introduced a successor rights clause for the sale or transfer of a business and amended the Act to cover employees of provincial boards or commissions.

The Act was amended once more in 1968. The principal amendment extended the definition of "work stoppage" and gave the Board the power to terminate an illegal stoppage or one caused by jurisdictional disputes. A vote was no longer required to determine if the majority of the employees in the bargaining unit favoured dues check-off. Now dues could be paid if the employer had been authorized by the individual employee to deduct them. Another amendment provided for a new certification process in the construction industry. If the Labour Relations Board determined that the bargaining unit requested was appropriate, then an immediate vote of the employees following the application for certification would be ordered.

Major amendments were made to the Trade Union Act in 1970 mostly focusing on the construction industry. A new division of the Board, the Construction Industry Panel, was established to deal with applications for certification or decertification of unions in that industry. Special rules now controlled certification procedures in the construction industry; unions were no longer able to apply under the general procedure. One major change empowered the Board to grant area certifications. Trade unions no longer required a majority of membership to apply for certification; instead, with 35 per cent they could apply for a vote and with 50 per cent support certification was to be granted automatically. In the general sections of the Act, provision was made for voluntary recognition of unions, preventive mediation, an expanded successor rights clause and the inclusion of a new union successor rights clause. Also amended were provisions regarding work stoppages and jurisdictional disputes. In 1971, another amendment

brought fishermen within the scope of the Trade Union Act. That amendment was the result of a prolonged strike by deep-sea trawlermen who sought to obtain voluntary recognition of the United Fishermen and Allied Workers Union as bargaining agent with two companies. One other amendment made later in 1971 provided that there could be no voluntarily recognized union when another union had applied for certification.

* * *

The Trade Union Act of 1972 repealed and replaced the Trade Union Act of 1947, substantially revising it in a number of areas. Under the new Act certification requirements were altered. Unions applying for certification under the general sections of the Act were no longer required to have a majority of the bargaining unit as union members before they could apply for certificatior. Under the new legislation the Board was required to order a vote if satisfied that between 40 and 60 per cent of the employees in the unit were members in good standing, but continued to have the discretionary power to certify automatically if a union had the support of at least 50 per cent of the employees in the unit and the Board believed a vote would serve no useful purpose. Making legislation in the country more uniform, Nova Scotia adopted the unfair labour practices of the Canada Labour Code in their entirety. As well, like all other provinces, Nova Scotia required that every collective agreement contain a provision for final settlement of disputes arising from the agreement. The Act set out a model clause which provided for a single arbitrator, different from its earlier requirement of a three-person board. The Minister was also to be given 48 hours' notice before a strike or lockout could take place. Part II of the Trade Union Act of 1972 dealt

specifically with the construction industry. Provisions relating to conciliation, mediation and industrial inquiry commissions were essentially unchanged by the new Act. One major amendment provided for accreditation of employers' organizations in the construction industry. Another decreed that the Ministry of Labour should pay one-third of the expenses of a single arbitrator or the chairman of the arbitration board. The remaining cost was still to be divided between the two parties. This provision was extended to all industries by a 1978 amendment.

In 1977 amendments were made that significantly altered the procedures for certification. A pre-hearing representation vote is now taken by the Board no more than five days following an application from a trade union for certification. Previously in a representation vote the Board required that at least 60 per cent of those entitled to vote participate and would grant certification only if a majority in the bargaining unit supported the union. The new Act dropped the 60 per cent participation requirement and a majority of those voting now decide the outcome. If, when faced with an unfair labour practice charge, the Board found that the employer contravened the Act in such a way that a pre-hearing vote could not reflect the true wishes of the employees, it was entitled to certify the union provided at least 40 per cent of the employees were members in good standing. If the union affected the outcome of the vote in a similar manner, or if the membership information was fraudulent, the Board could dismiss the application. Requiring a vote within such a short period of time is unique to the Nova Scotia Act although British Columbia has also made representation votes mandatory."[4]

Subsequent to that major overhaul, there have been a number of other amendments including a broad revision to the remedial powers of the Labour Relations Board to provide similar powers to those possessed by the Ontario Labour Relations Board.

The evolution of such changes has been accompanied by a tradition of study and consideration of the current legislation prior to the enactment of amendments. For example, His Honour Judge Alexander H. MacKinnon on February 1, 1962, rendered "Report of Factfinding Body re Labour Legislation". Subsequently, Mr. Ian MacKeigan chaired a committee which examined the provisions of the Trade Union Act as they related to the construction industry in 1970.

This Committee springs from that tradition and hopes that its recommendations will continue the evolution and adjustment of labour legislation in the Province of Nova Scotia in response to the changing needs of the parties in this field.

Mandate of Committee

As set forth in the introduction, this Committee was given an extremely broad and open-ended mandate in respect to the areas which it might address. Simply put, any matter falling within Part I of the Trade Union Act, as currently written, was and could be, a topic for discussion. Indeed, virtually no major area of that legislation escaped consideration by the Committee.

However, the mandate of the Committee did not permit it to review certain matters. In particular, a submission was received from the Canadian Union of Public Employees, Nova Scotia Highway Workers Union, Local 1867, in respect to the coverage of the workers represented by that Union under the provisions of the Trade Union Act.

Certain members of the Committee vigorously urged that the Committee undertake an examination of this question. However, when the mandate of the Committee was reviewed, it was determined that this matter was not within the terms of reference.

In addition, members of the Committee requested that the Committee undertake an examination of whether it would be desirable to provide for collective bargaining for members of the Civil Service. It was determined that these matters did not fall within the Trade Union Act, but rather were subject to other legislation. As such, they were not a proper subject for discussion within the mandate provided by

the Minister of Labour and Manpower. A similar conclusion was reached in respect of the request that the extension of collective bargaining rights be provided to inshore fishermen.

The Committee notes that with these exceptions there was no area which the Committee sought to examine which fell outside the scope of its mandate.

3. (A) LABOUR RELATIONS BOARD

Introduction

The key element of the administration of the Trade Union Act is the Labour Relations Board. Any modifications or "improvements" in the Trade Union Act will come to naught if they cannot be expeditiously and efficiently administered by the Labour Relations Board.

In general, the Committee wishes to commend the Board and its staff for the conscientious manner in which it discharges its duties. The dedication of the members and staff of the Board has done much to enhance the respect with which it is viewed by the various parties in the labour relations area.

However, the Committee received various representations as to ways in which the functioning of the Board could be improved and, indeed, received various criticisms of certain aspects of the manner in which the Board functions. The most frequently expressed criticism concerns perceived delays in the hearing of applications before the Labour Relations Board. There were, however, other criticisms of the Board brought forward which have been considered by the Committee and have led to the following recommendations.

Structure of the Board

The Committee studied the structure of the Board and its "tri-partite" nature wherein two Board members on a hearing panel are drawn from the ranks of the Trade Union movement, two are drawn from the ranks of those individuals with management experience, and the fifth member is an impartial and neutral chairman or vice-chairman.

Consideration was given to the "Canada Labour Relations Board model" wherein the members of the Board are "non-partisan" and the panel of the Board can consist of any of the Board members chaired by the Chairman or a Vice-Chairman. This model was rejected by the Committee because of its opinion that the expertise brought to bear on both sides of any particular issue by the tri-partite board model is desirable and should continue. Moreover, the parties believe the integrity of the functioning of the Board is enhanced by this structure.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE NOVA SCOTIA LABOUR RELATIONS BOARD MAINTAIN ITS CURRENT STRUCTURE AS A "TRI-PARTITE" BOARD WITH REPRESENTATIVES FROM LABOUR, MANAGEMENT AND AN INDEPENDENT CHAIRMAN AND VICE-CHAIRMAN.

Legal Training for Chairman and Vice-Chairman

The Committee noted the increase in the complexity of the issues which have come before the Labour Relations Board. While in the early days of the Board, it was commonplace for the parties to represent themselves and for union representatives and management personnel to present arguments on behalf of the parties, it is now the exception rather than the rule that both parties would appear before the Labour Relations Board without the benefit of legal counsel.

The introduction of legal counsel has increased the reliance on precedent and fostered the development of a distinctive jurisprudence by the various Labour Relations Boards throughout Canada. Indeed, the proliferation of reported cases in the various legal report series attest to the increasing complexity of the technical legal arguments advanced before this and other Labour Relations Boards.

Given those developments, the Committee is of the opinion that the previous informal practice of appointing chairmen and vice-chairmen with legal backgrounds should be formalized so that the individuals appointed as chairman and vice-chairman of the Labour Relations Board should have legal training as a pre-requisite to their appointment.

In making such a recommendation, the Committee should not be taken as recommending that practicing

barristers should, necessarily, become the chairman or vice-chairman of the Labour Relations Board. Rather, the prerequisite for such appointment would be that an individual would have successfully obtained his Bachelor of Laws degree.

THE COMMITTEE THEREFORE RECOMMENDS THAT A PREREQUISITE FOR APPOINTMENT TO THE POSITION OF CHAIRMAN OF THE LABOUR RELATIONS BOARD OF NOVA SCOTIA OR VICE-CHAIRMAN OF THE LABOUR RELATIONS BOARD OF NOVA SCOTIA SHALL BE THAT THE INDIVIDUAL HAS LEGAL TRAINING IN THE FORM OF A BACHELOR OF LAWS DEGREE.

Three-Man Boards

In general, the current practice of the Nova Scotia Labour Relations Board has been to sit in a panel of five members. While this is not inevitably the case, and the Board does sit with a panel of three members, in the majority of cases a five-man board hears the cases which come before it. Given that parties are usually represented by counsel, the administrative staff of the board have the unenviable task of arranging satisfactory dates which will coordinate with the schedules of seven individuals, all of whom have other responsibilities.

The Board under its present legislation has the flexibility to sit with three members. Given that one of the major complaints concerning the functioning of the Board has been the delay in the bringing of matters forward for hearing, it is the recommendation of the Committee that the

practice of sitting in three-man boards should be encouraged.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE LABOUR RELATIONS BOARD SHOULD BE ENCOURAGED TO SIT IN THREE-MAN PANELS IN ORDER TO EXPEDITE THE HEARING OF APPLICATIONS BEFORE THE BOARD.

Taken in concert with other recommendations set forth below concerning the size of the Board, three-man panels would permit the Board to sit simultaneously so that two hearings could go forward on the same day.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE LABOUR RELATIONS BOARD SHOULD BE ENCOURAGED TO SIT IN THREE-MAN PANELS WHEREVER IT IS POSSIBLE TO DO SO SO THAT TWO OR MORE PANELS MAY SIT AT THE SAME TIME.

Other Administrative Matters Concerning the Labour Relations Board

(i) Location of Hearings

In addition to the question of delay, there was considerable discussion by the Committee of the issue of accessibility to the Labour Relations Board. In particular, there was concern expressed that individuals in certain parts of the province are seriously inconvenienced by having to travel to Halifax for a hearing of the Board. Examples were cited of those cases which involve a large number of witnesses wherein the travel to Halifax placed a serious financial burden on both parties to an application.

The Committee is aware that travel by the Board, while being desirable, is not without difficulties. It requires additional expense in travelling outside of Halifax and involves other serious administrative difficulties. However, on balance, the Committee believes that accessibility to the Board through means of travel, in appropriate cases, outweighs any of the other inconveniences and justifies any additional costs involved therewith.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE BOARD GIVE CONSIDERATION, IN APPROPRIATE CASES, TO TRAVELLING TO AND HOLDING HEARINGS IN PARTS OF THE PROVINCE OTHER THAN HALIFAX.

(ii) Scheduling of Hearings

The difficulty of scheduling legal counsel for appearances before the Labour Relations Board was cited as a major source of delay in the hearing of applications. There was much discussion as to whether the actual source of delay in those instances was the unavailability of counsel or other matters. While the Committee realizes that the setting of fixed dates for hearings should be done, where possible, in consultation with counsel, it is the Committee's view that extensive delays should not be permitted in order to accommodate counsel for the parties where that will result in prejudice to either of the parties to the application.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE LABOUR RELATIONS BOARD SHOULD SCHEDULE HEARING DATES EXPEDITIOUSLY AND POSTPONEMENTS ONLY BE GRANTED IN EXCEPTIONAL CIRCUMSTANCES.

(iii) Additional Vice-Chairmen

The Committee has recommended that the Board should maintain its tri-partite character and sit in three-man panels. It also recommended that the Board should consider sitting simultaneously. Those recommendations have lead the Committee to a consideration of the question of the appointment of additional vice-chairmen to the Labour Relations Board.

This matter has been considered in concert with the question of whether the entire Board or at least the Chairman and Vice-Chairman should be "full time" appointments.

Given the conclusion reached, which will be discussed subsequently, that the Board should remain "part time", it is the opinion of the Committee that consideration should be given to the appointment of additional vice-chairmen so that more panels of the Board can be formulated.

However, this would have to be consistent with the workload, which, apparently, at this time is such as to not require any additional vice-chairmen.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE LEGISLATION SHOULD BE AMENDED TO PERMIT THE APPOINTMENT, WHEN NECESSARY, OF ADDITIONAL VICE-CHAIRMEN TO THE LABOUR RELATIONS BOARD.

(iv) Number of Board Members

Currently, there are two Labour representatives and two Management representatives appointed to the Labour Relations Board. In addition, there are two alternate labour and two alternate management members who can sit when the regular members are not available.

It is the opinion of the Committee that certain of the difficulties involved with scheduling have arisen because of the limited number of individuals available to

sit on any given day. The Committee does not see the requirement for the distinction between regular members of the Board and alternate members.

THE COMMITTEE THEREFORE RECOMMENDS THAT THERE SHOULD BE SIX LABOUR AND SIX MANAGEMENT REPRESENTATIVES APPOINTED TO THE LABOUR RELATIONS BOARD.

THE COMMITTEE FURTHER RECOMMENDS THAT ALL SUCH INDIVIDUALS SHOULD BE "REGULAR" MEMBERS.

(v) Full-Time Board and Limited Term Appointments

Considerable consideration was given to the question of whether the Board should continue as it is currently constituted, with part-time appointments, or whether there should be full-time appointments to the Board as is the case in certain other jurisdictions.

In general, it was the conclusion of the Committee that the volume of work associated with the Labour Relations Board is not such as to justify the full-time appointment of Board members. This is particularly so in light of the increase in the number of Board members which this Committee has recommended.

However, a different situation applies in respect of the Chairman of the Labour Relations Board. The Chairman has, in addition to his duties associated with hearings, administrative responsibilities for the staff of the Board and certain functionings of the Board in respect thereto.

Given those responsibilities, it is the recommendation of this Committee that the position of the Chairman should be full-time. However, in making that recommendation, the Committee would emphasize that it is necessary to have the terms and conditions of appointment of the chairman such that it will ensure that they are adequate to attract a highly qualified person.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE POSITION OF CHAIRMAN OF THE LABOUR RELATIONS BOARD SHOULD BE A FULL-TIME POSITION AND THAT THE TERMS AND CONDITIONS OF EMPLOYMENT SHOULD BE SUCH AS TO ENSURE THAT HIGHLY QUALIFIED PERSONNEL WOULD BE WILLING TO TAKE SUCH A POSITION.

The current members of the Labour Relations Board, including the Chairman and Vice-Chairman, are appointed "at pleasure". Concern was expressed that such appointments, by their very nature, lead to lengthy terms of service on the Board. While the gaining of experience in the functioning and decisions of the Labour Relations Board is a most desirable matter, concern was expressed that very lengthy terms of service may lead to one "losing touch" with more recent developments in the labour relations field.

It is the Committee's view that a healthy balance should be struck between experience on the Board and the new ideas and sensitivity for the current industrial relations milieu ensured by limited term appointments. In considering this matter, a number of suggestions were discussed. However, the Committee finally concluded that the above

objectives could be best achieved by having term appointments for all Board members, including the Chairman and Vice-Chairman. The Committee would emphasize that in making such a recommendation, it does not preclude successive terms of appointment. Rather, it merely provides the mechanism for change should it be felt desirable that such change occur for whatever reason.

THE COMMITTEE THEREFORE RECOMMENDS THAT MEMBERS OF THE LABOUR RELATIONS BOARD SHOULD HAVE FIXED TERMS OF OFFICE.

There was a concern that the change from "at pleasure" appointments to "term" appointments might lead to wholesale changes in the Board at the expiry of the first set of term appointments. This was not felt to be a desirable result. Therefore the Committee determined that a staggered set of appointments should initially be made.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE INITIAL APPOINTMENTS OF MEMBERS TO THE BOARD SHOULD BE FOR STAGGERED TERMS OF ONE, TWO AND THREE YEARS WITH SUBSEQUENT APPOINTMENTS BEING ON A THREE-YEAR BASIS.

There was concern that the members appointed to the Board should be individuals who have the confidence of the parties who come before the Board. It is the opinion of the Committee that this can be achieved through extensive consultations prior to the appointment of Board members.

THE COMMITTEE THEREFORE RECOMMENDS THAT CONSULTATIONS TAKE PLACE WITH THE APPROPRIATE ORGANIZATION OR ORGANIZATIONS PRIOR TO THE APPOINTMENT OF MEMBERS TO THE LABOUR RELATIONS BOARD.

Given the pivotal role played by the Chairman and Vice-Chairman of the Board, it was felt that there should be some stability in appointments to this position both in order to attract and to maintain appropriate candidates. In addition, continuity of expertise in the Chairman and Vice-Chairman of the Labour Relations Board is essential to the effective functioning of the Board. It was therefore the opinion of the Committee that the expiration of the terms of office of the Chairman and Vice-Chairman should not be coincident so as to ensure continuity in these positions.

THE COMMITTEE RECOMMENDS THAT THE CHAIRMAN AND VICE-CHAIRMAN BE APPOINTED FOR AN INITIAL TERM OF FIVE YEARS AND SUBSEQUENTLY HAVE REAPPOINTMENTS FOR THREE-YEAR TERMS. THE TERMS OF THE CHAIRMAN AND VICE-CHAIRMAN SHALL NOT BE COINCIDENT.

(vi) Written Decisions of the Labour Relations Board

A great deal of dissatisfaction was expressed in regard to the current Board practice of not rendering written decisions in respect of each application which comes before it. This criticism was particularly pronounced in respect of those decisions which have deviated from either announced Board policy or previous cases involving a similar question.

The lack of written reasons makes it difficult for practitioners in the field to advise, in advance, the likely outcome of applications and to adequately present cases on behalf of their clients before the Board.

The Committee is cognizant of the fact that written reasons may somewhat delay the speed with which decisions are rendered. If that is believed to be a serious concern, the Board could adopt the policy of rendering its decision and supplying written reasons subsequent thereto as has occurred in the past.

In any event, the Committee believes that the development of a coherent jurisprudence in respect of Board decisions outweighs any disadvantages which may result from delay in rendering of decisions.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE BOARD PROVIDE WRITTEN REASONS FOR THEIR DECISIONS WHEN REQUESTED, IN RESPECT TO ANY MATTER WHICH COMES BEFORE IT.

REMEDIAL POWERS OF THE LABOUR RELATIONS BOARD

The Committee members were generally satisfied with the recent amendments to the Act contained in Section 75A. However, there were certain specific areas concerning the remedial powers of the Board which the Committee felt should be specifically set forth to ensure that there was no question that the Board did indeed possess those powers.

(a) Unfair Labour Practices During Organizational Drives

Members expressed a concern that unfair labour practices committed during an organizational drive must be dealt with expeditiously in order that the effects of those breaches of the Act are dissipated quickly. In particular, the Committee noted that Section 24(9) is only of assistance if the union has as its members, at the date of its application, forty percent (40%) of the employees in the unit deemed to be appropriate. If employer unfair labour practices should occur at an early stage of an organizational drive, they may have a "chilling" effect of such a nature that the union is unable to reach the forty percent (40%) level. Should that occur, the union does not have available to it the provisions of Section 24(9).

In such circumstances, a union is often disinclined to even complain to the Board because there can be no practical remedy brought to bear if the hearing before the Board is delayed for any substantial period of time. On the other hand, if these matters come on quickly for hearing, the worst effects of such actions can be dissipated and appropriate remedies fashioned.

Concern was also expressed that the respondent in such an application should not be taken by "surprise" when the matter comes on for hearing before the Board and should have the opportunity to adequately prepare its case. Hence, the Committee recommends that the respondent be informed

concerning the substance of the complaint prior to the hearing thereof so that it will have an opportunity to adequately prepare its defence to the application.

THE COMMITTEE RECOMMENDS THAT COMPLAINTS OF UNFAIR LABOUR PRACTICES ARISING UNDER THE UNFAIR PRACTICES SECTION OF THE ACT (SECTION 51-56) OCCURRING DURING AN ORGANIZATIONAL DRIVE (I.E. PRIOR TO A CERTIFICATION VOTE BEING HELD BY THE LABOUR RELATIONS BOARD) SHALL BE HEARD BY THE LABOUR RELATIONS BOARD AS EXPEDITIOUSLY AS POSSIBLE, NORMALLY WITHIN 14 DAYS OF THE FILING OF THE COMPLAINT. THE RESPONDENT SHALL BE INFORMED OF THE SUBSTANCE OF THE COMPLAINT PRIOR TO THE HEARING AND IF NOT SO INFORMED, SHALL BE ENTITLED TO REQUEST AN ADJOURNMENT UNTIL THAT INFORMATION IS PROVIDED.

(b) Complaints of Failure to Bargain in Good Faith

The current legislation provides that complaints concerning a failure of a party to negotiate in good faith pursuant to Section 33 must be filed with the Minister (Section 34(1)) who then may determine whether that complaint is referred to the Labour Relations Board.

In practice, it is almost inevitable that the Minister will refer such a complaint to the Board for adjudication. The extra step of lodging the complaint with the Minister is anomalous, causes delays, and would not appear to have a practical purpose.

THE COMMITTEE RECOMMENDS THAT COMPLAINTS OF FAILURE TO BARGAIN FILED PURSUANT TO SECTION 33 OF THE ACT SHOULD BE FILED WITH THE BOARD RATHER THAN WITH THE MINISTER OF LABOUR.

(c) Declaratory Powers in Respect of Cease and Desist Orders

Concern was expressed by certain members of the Committee that the Labour Relations Board, in the cease and desist situation, did not have available to it the power to make a declaratory order. In other words, it was necessary for a work stoppage, as defined in the Act, to occur before the Board could issue a cease and desist order. It was felt that in certain areas, such as the health care field, that the Board should have power to rule upon the effect of a certain set of circumstances that, should they come to pass, are prima facie a violation of the Act and issue a cease and desist order. Such an order would indicate that in the event of the occurrence of certain events --eg. certain individuals refusing to report for work -- it would be deemed to be an illegal work stoppage and the Board would issue a formal cease and desist order upon proof of the occurrence of the facts which had been made a precondition to the issuance of such an order.

It was noted that Ontario has somewhat similar legislation found in Section 91(8). (Appendix "C" of this Report).

A consensus was reached by the Committee that it was desirable for the Nova Scotia Board to have a similar power and the Board should make reasonable arrangements for emergency situations in respect of contacting the Board in order to obtain such cease and desist orders.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE LABOUR RELATIONS BOARD HAVE THE AUTHORITY TO MAKE DECLARATORY ORDERS IN RESPECT OF THEIR CEASE AND DESIST POWER UNDER SECTION 49 OF THE ACT.

(d) General Enabling Section

There are certain provisions of the Act which do not provide a specific manner in which an application can be made to the Board for the determination of the rights of the parties. As such, while the rights and obligations exist in the statute, the parties are unable to bring such matters before the Board for adjudication. Such a situation defeats the purpose of having such specific statutory provisions. The undesirable nature of that situation is best summed up by the legal adage that "there should be no right without a remedy". Therefore, the Committee recommends that there should be a general enabling section permitting the Labour Relations Board to adjudicate upon allegations concerning the breach of any section of the Act. Such a provision is common place in labour relations legislation in other jurisdictions. Moreover, such a provision does not in any way add to the substantive rights and obligations contained in the Act. As well, a general enabling section does not change the remedial powers otherwise found in the Act.

THE COMMITTEE RECOMMENDS THAT THE TRADE UNION ACT BE AMENDED TO PROVIDE THE LABOUR RELATIONS BOARD WITH THE AUTHORITY TO HEAR APPLICATIONS ALLEGING A BREACH OF ANY PROVISION OF THE TRADE UNION ACT.

3. (B) ESTABLISHMENT OF THE COLLECTIVE BARGAINING RELATIONSHIP - THE CERTIFICATION PROCESS

(i) Introduction

The scope of the Act in respect to those individuals who will be eligible to engage in collective bargaining is the most important aspect of the legislation. All of the other rights and obligations set forth therein flow from the initial determination that a group of individuals are an appropriate unit to engage in collective bargaining. It is because of the importance of these provisions that they are undoubtedly among the most contentious matters with which the Committee was faced. There was lively discussion and debate on a wide range of concerns in respect of this area of the legislation. Unfortunately, in many of those areas, it was not possible to achieve a consensus. However, in others, a consensus was reached as set forth herein.

(ii) Definition of Employee

Currently, Section 1(1)(k) defines an "employee" as:

> "Section 1(1)(k) 'employee' means a person employed to do skilled or unskilled manual, clerical or technical work and includes:

(i) police constables or officials employed by a city, town, municipality or village commission, or board, commission or agency of, or a corporation controlled by a city, town, municipality or village commission;

(ii) a person employed or engaged on fishing vessels of all types or in the operation of these vessels on water, if he is paid wages or salary or accepts or agrees to accept percentage or other part of the proceeds of the adventure or of the catch in lieu of or in addition to wages."

Subject to the views the Committee has expressed below in regard to exclusions generally, it was felt that the portion of the definition which states "a person employed to do skilled or unskilled manual, clerical or technical work" was without meaning and might inadvertently exempt from the provisions of the Act individuals who otherwise should be included. The example was raised of university professors. While they have been certified on a number of occasions by the Nova Scotia Board, it is not clear which of the above categories they satisfy.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE DEFINITION OF EMPLOYEE SHOULD READ:

"'Employee' means a person employed by an employer and includes:

(i) police constables or officials employed by a city, town, municipality or village commission, or board, commission or agency of,

or a corporation controlled by, a city, town, municipality or village commission;

(ii) a person employed or engaged on fishing vessels of all types or in the operation of these vessels on water, if he is paid wages or salary or accepts or agrees to accept percentage or other part of the proceeds of the adventure or of the catch in lieu of or in addition to wages."

(iii) Professional Exclusions

A second limitation on the definition of "employee" is found in Section 1(2)(b) of the Act. This provision specifically exempts from engaging in collective bargaining members of the medical, dental, architectural, engineering or legal professions where qualified under the laws of the province and employed in that capacity.

On reviewing the legislation found in other provinces, the Committee noted that this exception is not universal. For example, the Canada Labour Code provides in Section 125(3) that:

> "Where a trade union applies under Section 124 for certification as a bargaining agent for a unit comprised of or including professional employees, the Board, subject to subsection (2)
>
> (a) shall determine that the unit appropriate for collective bargaining is the unit comprised of only professional employees, unless

such a unit would not otherwise be appropriate for collective bargaining;

(b) may determine that professional employees of more than one profession be included in the unit; and

(c) may determine that employees performing the functions, but lacking the qualifications of professional employees, be included in the unit."

The Committee had lengthy discussions as to the rationale for the exclusion of professionals. It was the consensus of the Committee that if such a professional performed truly "managerial" or "confidential" functions they would be excluded by Section 1(2)(a) of the Trade Union Act. On the other hand, if they did not perform such functions, it did not appear logical that they should be excluded from the Act merely on the basis of their professional status.

However, the Committee had concern that there might not be a sufficient community of interest between such professionals and other unionized employees of the same employer so a trade union would have difficulty carrying on meaningful negotiations on behalf of professional employees if the majority of members in the bargaining unit were not professionals.

The Committee therefore concluded that it would be appropriate to extend the right of unionization to members of the dental, architectural, engineering and legal professions, but that such individuals should be included within a separate bargaining unit as set forth in the Canada Labour Code.

Following much debate and discussion, it was the consensus of the Committee that practitioners in the medical profession fell within a somewhat different category because of the provisions of our Medicare system and the highly regulated nature of their fee structure. It was therefore concluded that they should continue to be exempted from the provisions of the Trade Union Act.

THE COMMITTEE RECOMMENDS THAT AS A GENERAL PRINCIPLE PROFESSIONALS SHOULD NOT BE EXCLUDED FROM THE PROVISIONS OF THE TRADE UNION ACT SIMPLY BECAUSE OF THEIR PROFESSIONAL STATUS AND THAT SECTION 1(2)(b) OF THE ACT SHOULD ONLY APPLY TO THE MEDICAL PROFESSION.

THE COMMITTEE FURTHER RECOMMENDS THAT THE ABOVE-MENTIONED PROFESSIONALS SHOULD CONSTITUTE A SEPARATE BARGAINING UNIT AND CONSIDERATION SHOULD BE GIVEN TO THE WORDING FOUND IN THE CANADA LABOUR CODE AT SECTION 125(3):

> **"Where a trade union applies under Section 124 for certification as the bargaining agent for a unit comprised of or including professional employees, the Board, subject to subsection (2):**
>
> **(a) shall determine that the unit appropriate for collective bargaining is the unit comprised of only professional employees, unless such unit would not otherwise be appropriate for collective bargaining;**

(b) may determine that professional employees of more than one profession be included in the unit; and

(c) may determine that employees performing the functions, but lacking the qualification of professional employees, be included in the unit."

(iv) Exclusion of Managers, Those Exercising Managerial Functions and Those Employed in a Confidential Capacity

The most often debated issue before the Labour Relations Board and the matter which proved to be the most contentious issue before this Committee, was the question of the exclusions found in Section 1(2)(a) of the Trade Union Act. This provision exempts from the Act individuals who are managers, superintendents, or are employed in a confidential capacity relating to labour relations or who exercise management functions.

In essence, this is a twofold exclusion. The first is a so-called "managerial" exclusion, the second is a "confidential" exclusion.

Management members of the Committee expressed serious concerns that this wording and the decisions of the Board pursuant thereto had not kept pace with the changes which had occurred in management styles and structures in modern industry. Examples were raised concerning centralization of personnel functions in personnel

departments with the practical result that very few first line supervisors ever hire or fire. Similarly, examples were raised concerning the pivotal role which an accounting department may hold in a large enterprise and the access which employees at a rather low level of the hierarchy may have to confidential information because of their computer skills.

Union representatives indicated that while there were concerns with the method of determination of the managerial exclusion, on balance, they did not favour a change in the legislation.

A proposal that certain factors be set forth in the Regulations so that they would be considered on each occasion by the Labour Relations Board was also rejected on the basis that it might prove to be too unwieldy.

However, because of the serious nature of the concerns of all parties in respect to the application of this section of the Act, the consensus of the Committee was that the Labour Relations Board should be urged to consider a wide range of factors in its determination as to the employee status of an individual in any given case. The Committee has therefore directed the Chairman to forward a letter to the Chairman of the Labour Relations Board indicating those matters which the Committee believes should be considered by the Labour Relations Board in its determinations as to managerial and confidential

exclusions. A copy of that letter is attached to this report as Appendix "D".

(v) Confidential Exclusion

Section 1(2)(a) of the Act currently excludes from its coverage those employees who are employed in a confidential capacity in relation to labour relations. Views were expressed that this was too narrow a concept as the type of information to which an employee might be privy which would put him into a confidential situation with his employer went beyond that information related to labour relations. However, the Committee was not able to reach a consensus as to any change which might be appropriate in this section and, as a result, cannot recommend any changes in respect thereto.

(vi) Eligibility to Vote on Certification Applications

The Committee considered proposals that more definitive guidelines should be given as to those employees eligible to vote, both in respect to certification applications and strike votes. For example, there are the vexing questions concerning those employees who are absent on Workers' Compensation, who are on long-term or short-term disability, and who for other reasons may not be actively employed as of the date of an application or vote, but who might have some relationship, often of a long term nature,

with the enterprise, such as to conceivably justify their participation in the vote.

A balance must be struck in these cases between fairness to the employee in providing a chance to voice his or her opinion in respect to a collective decision as to whether to be unionized against the legitimate expectations of the trade union seeking to determine the appropriate bargaining unit for any particular employer.

On balance, it was the conclusion of the Committee that the determination of such questions should be left with the Labour Relations Board.

THE COMMITTEE RECOMMENDS THAT QUESTIONS CONCERNING THE ELIGIBILITY TO VOTE IN RESPECT OF APPLICATIONS FOR CERTIFICATION AND STRIKE VOTES BE LEFT TO BE DETERMINED BY THE LABOUR RELATIONS BOARD ON A CASE-BY-CASE BASIS.

(vii) Build Up of Employees During the Organizational Period

Situations arise wherein a new employer may commence operations with a small number of employees, expecting in the short term to expand that number of employees substantially. A concern was expressed that a union might sign as members a majority of a very small group of employees and thereby become certified for a much larger group in which it may not have majority support.

The Committee reviewed the practice in other provinces and, specifically, the practice in Ontario. It is

the Committee's understanding of the Ontario practice that a vote on a certification application can be delayed by the Labour Relations Board if it believes it to be a buildup situation.

In those cases, if the union has forty-five percent (45%) support, or more, in the unit, the Board will hold a vote at some later point. It is the conclusion of this Committee that it would be useful for the Nova Scotia Labour Relations Board to follow the practice of the Ontario Board in this regard. It is our understanding that this has, in fact, on at least one occasion, occurred in the past.

THE COMMITTEE RECOMMENDS THAT THE NOVA SCOTIA BOARD IN THE "BUILDUP" SITUATION SHALL GIVE CONSIDERATION TO THE DELAY OF A CERTIFICATION VOTE IF THE CIRCUMSTANCES ARE APPROPRIATE, FOLLOWING THE PRACTICE OF THE ONTARIO LABOUR RELATIONS BOARD. THE PRACTICE OF THAT BOARD IS SET FORTH IN APPENDIX "E" TO THIS REPORT.

(viii) "Build Down" - Decertification

The Committee had similar concerns in respect to the decertification situation. In those industries in which there are large seasonal fluctuations of employees, it would appear to be unfair that a small number of employees employed in the "off season" could bring about the decertification of a unit wherein the majority of those regularly employed still supported the trade union.

THE COMMITTEE RECOMMENDS THAT IN AN APPLICATION FOR REVOCATION OF CERTIFICATION CONSIDERATION BE GIVEN BY THE BOARD TO SEASONAL FLUCTUATIONS IN EMPLOYMENT WITH REGARD TO THE TIMING OF A VOTE AND THOSE ELIGIBLE TO VOTE.

(ix) Posting of Notices - Certification Applications

Members of the Committee had a concern that certain unfair labour practice complaints coming forward before the Labour Relations Board were prompted by a lack of knowledge by employers of their obligations under the Act rather than any malicious motive whereby the employers intended to contravene the Act. Particularly among smaller employers, their knowledge of the Trade Union Act and the prohibitions contained therein is somewhat limited.

The Committee believes that the provision of detailed information to employers and employees in the form of a list of "do's and don'ts" would be useful, particularly in the case of a smaller employer. Such a document would provide both the employer and the employee with an easily

understandable set of rules and regulations which, it is hoped, would prevent some of the "inadvertent" type of unfair labour practices which have occurred in the past.

It is the Committee's view that it would be more appropriate for the Labour Relations Board to develop such a list rather than to have this Committee make specific suggestions in regard thereto.

THE COMMITTEE RECOMMENDS THAT THE LABOUR RELATIONS BOARD DEVELOP A COMPREHENSIVE LIST OF "DO'S AND DON'TS" FOR ALL PARTIES DURING THE CERTIFICATION PROCESS WHICH COULD BE POSTED AND SUPPLIED TO ALL PARTIES AS OF THE DATE OF APPLICATION FOR CERTIFICATION.

(x) Amendment of Certification Order

The Trade Union Act provides in Section 26 for applications to include specific additional classifications of employees in, or to exclude specific classifications of employees from the bargaining unit. The regulations made pursuant to Section 26 provide that an application to amend the certification order to include additional classification of employees in the unit shall, "subject to the direction of the Board, ... be processed as an Application for Certification".

Those particular provisions do not provide a great degree of guidance in respect of the procedure to be followed in amendment applications. There are two general categories of applications and different considerations apply to each.

The first involves a particular individual or limited numbers of individuals (in proportion to the entire bargaining unit) who may, because of a change in function, be considered to be appropriate for inclusion or exclusion from the bargaining unit. In those situations, it would appear to be inappropriate to require a vote of those individuals to determine their willingness for inclusion or exclusion as the basic question is whether the functions which they perform are of such a nature as to make them more similar to those employees in the unit or to those excluded from it.

A more difficult question concerns an application to include a large number of employees in the currently existing bargaining unit. It is not unknown for such amendment applications to involve a larger number of individuals than those who are currently included within the bargaining unit.

It is the consensus of the Committee that in this latter situation it is appropriate for the Board to take into consideration the wishes of those individuals who are sought to be included within the bargaining unit. Therefore, when the group being applied for in the amendment application is forty percent (40%) or more of the existing bargaining unit, the Labour Relations Board shall order a vote of those additional individuals applied for, before

determining whether or not they should be included in the original bargaining unit.

A concrete example of the "40% rule" is that a vote would be required if four or more members were to be added to a unit of ten individuals.

The voting procedure would be similar to that followed in a certification vote in that there would be a speedy pre-hearing vote and the vote would only be among those members sought to be included, rather than a vote of the entire unit.

If the number sought to be included on the face of the application meets the "40% rule", the Board will order a vote which will normally be held within five days of the application. However, the vote would not be counted until after the Board had held a hearing to consider the application and was satisfied that, in fact, the "40% rule" was applicable to the particular application in question.

THE COMMITTEE RECOMMENDS THAT THE TRADE UNION ACT BE AMENDED TO PROVIDE FOR A SPEEDY PRE-HEARING VOTE WHEN AN APPLICATION FOR AMENDMENT OF A CERTIFICATION ORDER INVOLVES AN ADDITION OF FORTY PERCENT (40%) OR MORE MEMBERS TO THE ORIGINAL UNIT. THE COMMITTEE RECOMMENDS THAT THE VOTE ON INCLUSION BE LIMITED TO THOSE INDIVIDUALS WHO ARE BEING ADDED TO THE BARGAINING UNIT.

(xi) Abandonment of Certifications

There have been occasions where a trade union has certified a bargaining unit of employees and then, for one reason or another, has ceased to service that particular

bargaining unit. In those cases, there is an outstanding certification order which is not the subject of any activity. The individual employees affected by that certification order may not have the will or desire to bring forward an application for decertification while the employer, in the current state of the jurisprudence in Nova Scotia, cannot do so because such an application would clearly be "tainted" and would, in all likelihood, be dismissed by the Board on that basis.

The Committee believes that it is not a desirable practice to have outstanding certification orders which are not the subject of active ongoing relations between the employer and the bargaining agent. However, the Committee is reluctant to provide to employers the right to apply for a declaration that a certification order has been abandoned except in the clearest of circumstances.

The Committee has given this matter consideration and concluded that an employer should be permitted to apply for a declaration, by the Labour Relations Board, that a union has abandoned a certification if there has been no servicing or activity by a union on behalf of its members in the bargaining unit for a twelve-month period. In respect of the meaning of "servicing", this should be taken in the practical sense of the types of activities which a union which still sought to represent the employees, in that type of unit, would carry on. For example, some units need very

little day-to-day "servicing" so that while a union is still actively involved in the affairs of the unit, there may not be much day-to-day contact with the members therein. In such a case, there would not be an abandonment if the type of servicing appropriate to that type of bargaining unit was continuing.

On the other hand, if a union has had no contact with the unit for a twelve-month period, has not held membership meetings, has not processed grievances, and has not otherwise undertaken servicing, it could be deemed to have walked away from or "abandoned" the bargaining unit. For example, if a union certified for a bargaining unit had commenced collective bargaining but had not concluded a collective agreement and no negotiations with the employer or contact with the membership had occurred for a twelve-month period, it would appear to be a proper case for an employer to seek a declaration from the Board that the unit had been abandoned.

THE COMMITTEE RECOMMENDS THAT EMPLOYERS SHOULD HAVE THE RIGHT TO APPLY TO THE LABOUR RELATIONS BOARD FOR A DECLARATION THAT A CERTIFICATION ORDER HAS BEEN ABANDONED BY A TRADE UNION WHERE THE TRADE UNION HAS NOT SERVICED THE MEMBERS OF THE BARGAINING UNIT IN QUESTION FOR A TWELVE-MONTH PERIOD.

(xii) Decertification

The management representatives on the Committee strongly urged that the current provisions in respect to decertification be changed. It was proposed that the decertification proposal should be the "mirror image" of the certification process.

Specifically, the management representatives believed that the disclosure of the names of the individuals who signed the petition requesting a decertification of the union could, in certain circumstances, place those individuals in a situation where they might be the subject of harassment from their fellow employees.

The Union representatives recounted their experience in such situations and indicated that they had not encountered such difficulties.

This proposal engendered much vigorous debate but in the end result a consensus could not be reached.

3. (C) COLLECTIVE BARGAINING

(i) Introduction

Following the certification of a trade union, the employees who have chosen to bargain collectively do not realize that goal until they have met with their employer and entered into a collective agreement. It is well recognized and accepted in the industrial relations community that the obligation on the parties is to meet and endeavour to reach a collective agreement or, as set forth in Section 33(a) of the Act, to "make every reasonable effort to conclude and sign a collective agreement".

However, there is no obligation upon the parties to reach a collective agreement. One of the major difficulties in this area, particularly in first collective agreements, is to determine when the line between "hard" (but legitimate) bargaining is crossed and the parties have entered the "failure to bargain" area.

Under this heading, the Committee will consider some of the technical procedures involved with collective bargaining and other miscellaneous questions arising from the collective bargaining provisions of the Trade Union Act.

(ii) First Contract Legislation

Union representatives on the Committee strongly urged the adoption of so-called "first agreement

legislation" whereby the Labour Relations Board, in appropriate circumstances, could impose a first collective agreement upon an employer and a union. The imposition of such agreements would only take place following a failure by one party or the other to bargain in good faith, a finding by the Labour Relations Board in that regard, and a determination that the imposition of such an agreement was appropriate.

The Committee reviewed the experience in other jurisdictions with first agreement imposition. In general, the view was expressed by some members of the Committee that such legislation had been less than successful in respect of the ultimate survival of viable bargaining units entering into a second and subsequent collective agreements. In any event, the Committee was unable to reach a consensus concerning first agreement legislation.

(iii) Religious Exemption

Submissions were received by the Committee urging that those individuals who as an article of their faith cannot belong to a trade union should be exempted from belonging to such a trade union and from paying dues thereto.

Following discussion, the Committee concluded that this did not appear to be a problem of any great magnitude in Nova Scotia, and concluded that the legislation should not be amended to make any exemption on a religious basis.

(iv) Rand Formula

In the experience of Committee members, the Rand formula is a standard provision found in virtually all "mature" collective bargaining relationships. Such provisions are essential in order to ensure the long-term financial viability of the trade union organization. Moreover, most employers do not feel that there is any detriment to them in agreeing to such a provision.

In addition, all employees have the expectation, and the trade union has a legal obligation, to represent each member of the bargaining unit fairly. In particular, all members of the bargaining unit, whether dues paying union members or not, gain advantages from the representation by the trade union. If a wage increase is achieved through collective bargaining, it applies to all members of the bargaining unit, not just those who are paying dues to the union. Hence, because the benefits are achieved by all members of the unit, it was felt that all members of the bargaining unit should contribute to the expenses incurred by the trade union in representing those members.

In Ontario, the relevant provision is Section 43:

> "Section 43(1) Except in the construction industry and subject to Section 47, where a trade union that is the bargaining agent for employees in a bargaining unit shall request, there

> shall be included in the collective agreement between the trade union and employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and remit the amount to the union, forthwith."

It was the opinion of the Committee that the inclusion of a provision similar to that found in the Ontario Act would have a salutary effect on the negotiation of first collective agreements and as such, is in the best interests of all of those engaged in the industrial relations field as it contributes to ensuring continuing labour peace.

THE COMMITTEE THEREFORE RECOMMENDS THAT A STATUTORY RAND FORMULA PROVISION, SIMILAR TO THAT FOUND IN THE ONTARIO LEGISLATION, BE INCLUDED IN THE TRADE UNION ACT.

(v) Technological Change

One of the major concerns facing both labour and management in recent years has been the impact of technological change on all aspects of the work place from the shop floor to the executive suite. It would be possible to devote the time and effort of an entire committee for some period of time to a consideration of the many ramifications of technological change in the work place.

Views as to the best manner in which to soften the impact of technological change varied greatly within the Committee. As a general point, the preferred approach to technological change appears to be one which is negotiated on a case-by-case basis between individual employers and employees. Indeed, there were numerous examples provided of specific collective agreement provisions which dealt with the notification of impending technological change and the manner in which such changes can be implemented with the least disruption in the work force.

There were suggestions that provisions should be contained in the legislation similar to those found in the Canada Labour Code. The Committee was not able to reach a consensus on this point.

The Committee did reach a consensus that the best manner by which to lessen the impact of technological change is through discussions between management and labour prior to the implementation of those changes. It is the consensus of the Committee that it was desirable to mandate that such discussions should take place but that because of the myriad circumstances involved with technological change, the results of those discussions should not be dictated to the parties by specific statutory provisions.

In addition, there may be exceptional circumstances in which the prior discussion of a technological change may place a company at a competitive disadvantage. In such a

situation, it is the view of the Committee that the employer should be given the opportunity of demonstrating to the Labour Relations Board that in the particular circumstances of its case it could not, from a viable competitive viewpoint, have initiated discussions within the time frame required by the recommendation which follows.

If an employer is able to demonstrate that type of situation, the employer may make a payment to its employees in lieu of the three-month notification period contained in the following recommendations.

THE COMMITTEE RECOMMENDS THAT THE GOVERNMENT SHOULD BE URGED TO MAKE AVAILABLE EXPERTISE TO SMALL BUSINESSES FACED WITH TECHNOLOGICAL CHANGE AS TO THE BEST MANNER IN WHICH TO LESSEN THE IMPACT OF THAT TECHNOLOGICAL CHANGE ON ITS EMPLOYEES.

THE COMMITTEE FURTHER RECOMMENDS THAT THE TRADE UNION ACT BE AMENDED TO INCLUDE THE FOLLOWING PROVISION:

"(A) WHEN A TECHNOLOGICAL CHANGE RESULTS IN OR IS LIKELY TO RESULT IN A LOSS OF EMPLOYMENT OF FIVE OR MORE EMPLOYEES WITHIN A THREE-MONTH PERIOD, THE EMPLOYER AND THE TRADE UNION REPRESENTING EMPLOYEES SHALL, PRIOR TO THE LOSS OF EMPLOYMENT, AND NOT LATER THAN THREE MONTHS BEFORE THE FIRST EMPLOYEE IS LAID OFF, FORM A JOINT COMMITTEE TO DISCUSS THE IMPLEMENTATION OF THE LAYOFF.

(B) IF AN EMPLOYER FAILS TO PROVIDE THE THREE-MONTHS' NOTICE REQUIRED IN SUBSECTION (A) AND CAN DEMONSTRATE, TO THE LABOUR RELATIONS BOARD, THAT TO HAVE SO DISCUSSED THE TECHNOLOGICAL CHANGE WITH THE BARGAINING AGENT WOULD HAVE PLACED THE EMPLOYER AT A COMPETITIVE DISADVANTAGE, THE EMPLOYER SHALL PROVIDE THE EMPLOYEES AFFECTED WITH THREE-MONTHS'

WAGES IN LIEU OF NOTICE AND THE EMPLOYER SHALL FORTHWITH MEET WITH THE UNION TO DISCUSS THE IMPLEMENTATION OF THE LAYOFF AND MEANS OF MINIMIZING THE ADVERSE CONSEQUENCES OF THE LAYOFF.

(C) ANY PERIOD OF NOTICE ACTUALLY PROVIDED TO THE EMPLOYEES BY THE EMPLOYER SHALL BE DEDUCTED FROM THE THREE-MONTHS' WAGES IN LIEU OF NOTICE AS PROVIDED IN SUBSECTION (B)."

(vi) Composition of Union Negotiating Committee

Submissions were received concerning the composition of the union negotiating committee and, in particular, the concern was expressed that in certain instances an employee from the particular bargaining unit involved is not present on the union negotiating committee. The suggestion was made that the legislation mandate that at least one member of the bargaining unit concerned be present on any negotiating committee.

In general, the members of the Committee indicated that this practice is in fact followed in virtually every instance. The exception involved "composite" bargaining units or province-wide bargaining units in which it would be virtually impossible to have members from all segments of those units present at the bargaining table.

Following discussion, it was the consensus of the Committee that any such proposal would not be workable.

(vii) Conciliation and Mediation

In general, the members of the Committee expressed satisfaction with the current statutory framework in respect of both conciliation and mediation. However, the practice of conciliation and conciliation services was the subject of criticism by Committee members.

THE COMMITTEE RECOMMENDS THAT THE MINISTER UNDERTAKE AN INDEPTH REVIEW OF THE APPOINTMENT AND TRAINING OF CONCILIATION OFFICERS AND THE PRACTICE AND PROCEDURES OF CONCILIATION SERVICES IN NOVA SCOTIA.

Another concern involved a tactic, occasionally employed, of one party requesting conciliation prior to the commencement of any meaningful negotiations. Given the prerequisites found in Section 45 of the Act for the commencement of a legal strike, it was the opinion of certain Committee members that conciliation was being requested only as a matter of form so that the union can get in a strike position at the earliest possible moment. This was generally felt to be an abuse of the conciliation procedure, which should be aimed at the settlement of disputes prior to the necessity of the parties entering into a strike position.

It was the consensus of the Committee that there should be some controls placed on the appointment of conciliation officers to ensure that the parties have themselves endeavoured to narrow the range of issues between them prior to proceeding to conciliation.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE TRADE UNION ACT BE AMENDED TO REQUIRE THAT "MEANINGFUL NEGOTIATIONS" HAVE TAKEN PLACE BEFORE THE MINISTER APPOINTS A CONCILIATION OFFICER.

THE COMMITTEE ALSO RECOMMENDS THAT ADDITIONS BE MADE TO THE TRADE UNION ACT REGULATIONS REQUIRING THAT BASIC INFORMATION BE SET FORTH IN EVERY APPLICATION FOR CONCILIATION, INCLUDING SUCH INFORMATION AS THE NUMBER OF MEETINGS HELD BETWEEN THE PARTIES, THE CLAUSES UPON WHICH AGREEMENT HAS BEEN REACHED, THE CLAUSES WHICH ARE CURRENTLY OUTSTANDING, AND THE ISSUES BETWEEN THE PARTIES AS VIEWED BY EACH OF THEM.

(viii) Conciliation Boards

There was discussion as to whether the conciliation board structure still served a useful purpose. It was the conclusion of the members of the Committee that indeed it did, but that there should be a minor change in the legislation so that it might provide for either a three-man or one-man board which, as is now the case, may only be appointed on the joint request of the parties.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE ACT, SECTION 59, BE AMENDED TO PROVIDE FOR THE OPTION OF A ONE-MAN CONCILIATION BOARD, AS WELL AS THE OPTION OF A THREE-MAN CONCILIATION BOARD, EITHER BOARD TO BE APPOINTED ON THE JOINT REQUEST OF THE PARTIES.

3. (D) ARBITRATION

(i) Introduction

Early on in the discussions of the committee, the difficulties involved with the arbitration process and, in particular, the delays encountered by parties in having a dispute adjudicated by arbitration, were expressed by all members of the Committee. This concern was of such a pressing nature that it was felt appropriate to render an interim report to the Minister in respect of the matter of expedited arbitration and other concerns falling within the general field of arbitration.

On April 16, 1985, by way of a letter from the Chairman to the Minister, the Committee forwarded its unanimous consensus on this matter. That letter reads as follows:

"April 16, 1985

Honourable David Nantes
Minister of Labour
6th Floor, 5151 Terminal Road
P.O. Box 697
Halifax, Nova Scotia
B3J 2T8

Dear Mr. Minister:

Committee to Review Part I of the
Trade Union Act (Non-Construction)

The Committee is pleased to present for your consideration an interim report, dealing with the arbitration provisions of the Trade Union Act.

The Committee has had a number of productive meetings which have dealt with a wide variety of topics. In respect of the arbitration provisions, the members of the Committee have reached a consensus that those provisions are in need of revision.

The Committee has been able to reach a consensus recommendation concerning the type of amendments in this area which are required in order to facilitate better labour relations in the Province of Nova Scotia. Because of the high priority which all members of the Committee have placed on these changes, the Committee has directed me to place before you an interim report with a request that consideration be given by government to action in regard thereto at the earliest possible date.

The various aspects of the Committee's recommendations will be dealt with under a number of headings.

1. Expedited Arbitration -

A serious concern of all members of the Committee has been the delay in procuring the appointment of arbitrators to decide grievances between the parties to a collective agreement. A grievance is an irritant in the work place for both sides of the labour/management equation and does nothing to assist the relationship between the parties if left outstanding for a lengthy period of time. Currently, however, there can be extensive delays in bringing a matter on to a hearing before an arbitrator.

The Committee has reviewed the various legislative schemes which have addressed this problem. Particular attention was paid to the provisions found in the Ontario Labour Relations Act as well as that found in the recently amended Manitoba Labour Relations Act. While these acts are essentially similar, the principal difference concerns the mechanism whereby an arbitrator under the so-called "expedited" system is appointed. In Ontario this takes place through the "Office of Arbitration" while in Manitoba it is done by the Labour Relations Board. It was the consensus of the Committee that the former approach rather than the latter would be more appropriate in Nova Scotia.

Because of the importance which the parties attach to the independence of the Director of Arbitration -- both in fact and from the perspective of the parties -- it is important that the method of selection be one in which both parties have complete confidence.

Therefore, it is the recommendation of the Committee that the Province of Nova Scotia adopt a system of expedited arbitration based on the Ontario model. The appointment of arbitrators would be made by a civil servant employed in the Department of Labour to be known as the Director of Arbitration. The Director of Arbitration shall be appointed in consultation with the Joint Labour/Management Committee recommended to be formed in Item 5. Subsequent appointments shall also be made in consultation with that Committee.

2. Mediation Officers -

Statistics from Ontario indicate that a substantial proportion of the cases which request expedited arbitration are settled by the intervention of "mediation officers" who are appointed by the Office of Arbitration to assist the parties in resolving their differences. An integral part of the "expedited arbitration" system is the requirement that there be present in such a system the type of "settlement officer" envisaged by Section 45(6) of the Ontario Act. A copy of the relevant provision of the Ontario legislation is attached to this report.*

It is the recommendation of the Committee that the proposed legislation contain provisions for the appointment of mediation officers similar to the provisions found in Ontario.

3. Specifics of the Legislation -

Following lengthy discussions, the Committee has agreed that the Ontario model should be followed as closely as possible in any legislation which may be drafted as a result of the recommendations of this Committee. Attached to this report is a copy of Section 45 of the Ontario Act.* It will be noted that a key provision of this legislation is found in Section 45(2) which

*[Appendix F]

only permits a party to request the "expedited" arbitration procedure after exhausting the grievance procedure found within his collective agreement or after thirty (30) days have elapsed from the time the grievance was first brought to the attention of the other party, whichever occurs first. The Committee believes that a crucial element in any legislation is that the parties exhaust their internal grievance procedure which they had freely negotiated prior to having access to an expedited procedure. Moreover, the expedited procedure should not be available unless explicitly requested by either party.

Therefore, the Committee recommends that a party only have access to the provisions of the Act concerning expedited arbitration after they have exhausted the grievance procedures found in their collective agreement.

Section 45(4) of the Ontario Act provides for the appointment of a single arbitrator. The Committee recommends that any Nova Scotia legislation also provide for a single arbitrator, regardless of any provisions which may be found in the collective agreement for the provision of a tri-parte (sic) arbitration board. It was felt that the purpose of speedy arbitration would be defeated if the tri-parte (sic) board was used in such a system as one of the major delays in proceeding to arbitration is the formation of a tri-parte (sic) board.

The Committee recommends that any system of "expedited" arbitration utilize a single arbitrator.

4. Rendering of Decision -

Section 45(8) of the Ontario legislation provides that an arbitrator shall have the power to provide oral decisions. Under the relevant Manitoba legislation (Section 113.5(10) and (11)) the parties may request an arbitrator to make an oral decision within one day after the conclusion of the hearing, and that a written decision must be made within fourteen (14) days after the conclusion of the hearing in the case of dismissal or suspension; within twenty-one (21) days in any other case.

It is the recommendation of the Committee that the arbitrator be obliged to make an oral decision within fourteen (14) days from the completion of the hearing and that the arbitrator be obliged to render reasons within thirty (30) days from the oral decision.*

(*See additional clarification of this point at Page 66.)

5. Joint Labour/Management Committee -

One of the reasons for delay in arbitrations in Nova Scotia is the lack of arbitrators in whom both labour and management have confidence. The Committee recognizes that a system of expedited arbitration will require a larger "pool" of arbitrators. It is also acknowledged that any such system will not work unless it can gain the confidence of the parties, which can only be ensured through all aspects of the labour spectrum having confidence in the arbitrators who are appointed under such a system.

While some may believe that arbitrators are "born, not made", it is the belief of the Committee that a serious effort should be undertaken to provide training for potential arbitrators so that they have some background prior to being appointed by the Director of Arbitration.

Because a system of expedited arbitration is a major new development in the Province of Nova Scotia, it is the recommendation of the Committee that a Joint Labour/Management Advisory Committee be created to oversee the initial start-up of a system of expedited arbitration, to formulate an acceptable training program for potential arbitrators, and to remain in place to act as a "sounding board" to monitor the functioning of such a system.

A number of models for the training of arbitrators were examined by the Committee.

Upon reflection, however, it is the recommendation of the Committee that the exact mechanism for the training of arbitrators and the formulation of a programme in regard thereto is best left to be decided by a Joint Labour/Management Advisory Committee formulated for that purpose.

6. Registration of Arbitration Awards as an Order of the Court -

The current system of registration of arbitration awards pursuant to the Arbitration Act is cumbersome, expensive and an unnecessary adjunct to the scheme of speedy resolution of disputes through the arbitration process.

It is the recommendation of the Committee that the decision of an arbitrator shall be filed with the Court upon the request of either party and upon such filing, the decision would become a judgment in the same way as a judgment or order of the Court and enforceable as such.

In making this recommendation, the Committee had specific regard to the wording of Section 45(11) of the Ontario Act and *Section 113.2 of the Manitoba Act, copies of which are attached hereto.

7. Substance of the Grievance -

It is the recommendation of the Committee that arbitrators in Nova Scotia be given the specific authority to look to the substance of the matter in dispute. However, the Committee notes that any such provision should not empower the arbitrator to modify, alter or amend any of the terms of the collective agreement. Therefore, the Committee recommends the adoption of wording which states:

> **"An arbitrator or arbitration board shall, in respect of any matters submitted to arbitration, have regard to the real substance of the matter in dispute between the parties but shall not have the power to modify, alter or amend the terms of the collective agreement."**

8. Other Matters -

The Committee has considered other matters in respect of the arbitration of grievances but has

[* Appendix G]

as yet been unable to reach a consensus in regard thereto.

However, the Committee attaches great importance to the above recommendations concerning expedited arbitration and other amendments to the Act in regard to the provision of arbitration to parties to collective agreements and has therefore filed this interim report with you for your consideration.

On behalf of the Committee, I would ask that these recommendations be given your sincere consideration at the earliest possible date. If you would require any clarification of these recommendations, the Committee would be more than pleased to provide the same at your convenience.

All of which is respectfully submitted by the Committee to Review Part I of the Trade Union Act, this 16th day of April, A.D. 1985.

JOHN C. MacPHERSON,
Chairman,
Committee to Review Part I
of the Trade Union Act

cc Committee Members
Paul Langlois, Esq."

Subsequent to the rendering of that interim report, the Committee has from time to time considered other aspects of the expedited arbitration provisions. As a result thereof, the Committee has concluded that while speed is of the essence, the parties themselves, should they decide to do so, should be given the option of a single arbitrator or a three-man board provided that the time limits in the legislation are adhered to.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE PARTIES THEMSELVES MAY PROVIDE FOR THE ESTABLISHMENT OF A THREE-MAN ARBITRATION BOARD, ON AN EXPEDITED BASIS, SO LONG AS THE TIME FRAME FOR THE ESTABLISHMENT OF AN ARBITRATION BOARD AS SET FORTH IN THE AMENDMENTS TO THE ACT ARE ADHERED TO.

A minority of collective agreements in the Province of Nova Scotia provide that specific named individuals (one or several) are the sole arbitrators who will be utilized pursuant to that collective agreement. When more than one individual is named, the arbitrator is chosen on a rotating basis. There was a concern that if the parties have negotiated a specific roster of individuals as named arbitrators that this should not be circumvented by use of the expedited arbitration system. On the other hand, the Committee was of the view that the speed associated with the expedited arbitration provisions should not be lost because of naming of such individuals in the collective agreement.

THEREFORE, THE COMMITTEE RECOMMENDS THAT THE PARTIES TO A COLLECTIVE AGREEMENT WHICH CONTAINS A NAMED ROSTER OF ARBITRATORS SHALL HAVE ACCESS TO THE PROVISIONS OF THE ACT PROVIDING FOR EXPEDITED ARBITRATION BUT THE ARBITRATOR APPOINTED TO HEAR SUCH A CASE MUST BE ONE OF THE ARBITRATORS INDICATED BY THE PARTIES, PROVIDED THAT THE OTHER PROVISIONS OF THE ACT CONCERNING TIME LIMITS CAN BE ADHERED TO IF SUCH INDIVIDUALS ARE APPOINTED.

The Committee, in its letter to the Minister, recommended in Recommendation #2 that the proposed legislation contain provisions for the appointment of a mediation officer similar to the provisions in Ontario. In

that regard, the Committee would like to clarify that these mediation officers should be appointed by and under the authority of the Director of Arbitration as set forth in Recommendation #1 to the Minister. It was the consensus of the Committee that the mediation officer should be separate and apart from the current conciliation services offered by the Department of Labour in regard to the negotiation of collective agreements.

THE COMMITTEE RECOMMENDS THAT THE MEDIATION OFFICERS PROPOSED IN RESPECT TO ARBITRATION SHOULD BE SEPARATE FROM THE CONCILIATION SERVICES OF THE DEPARTMENT OF LABOUR AND SHOULD BE UNDER THE JURISDICTION OF THE DIRECTOR OF ARBITRATION.

In Recommendation #4, in the letter to the Minister, the Committee indicated that the arbitrator should be obliged to render reasons within thirty days from the date of the oral decision. The Committee would like to clarify that those reasons must be in writing.

After consultation with their constituent organizations, the management representatives dissent from recommendations 36 to 47.

3. (E) STRIKES AND LOCKOUTS

(i) Introduction

With the exception of the area of managerial exclusions, the question of strikes, strike votes and other matters relating thereto engendered the most concern from those who submitted written submissions to the Committee and utilized a large proportion of the time the Committee spent in its deliberations.

While all of the suggestions put forward in the briefs provided to the Committee have been considered by the Committee, consensus has only been reached in respect of a limited number of items.

(ii) Government Supervised Strike Vote

There were a number of submissions requesting that the government intervene and supervise the strike votes taken by a trade union in each and every case. This would be an addition to the Act which currently requires that, prior to a strike that a secret vote of bargaining unit members be held:

> "Section 45(3)(a): Notwithstanding anything contained in this Act,
>
> (a) no person shall declare or authorize a strike and no employee shall strike until after a secret vote by ballot of employees

> in the unit affected as to whether to strike or not to strike has been taken and the majority of such employees have voted in favour of the strike; ..." [Emphasis added]

The basic thrust of the proposals were that the Department of Labour should supervise the taking of such secret ballots in each case. It was the experience of the members of the Committee, both labour and management, that cases of abuse in respect of the taking of strike votes were rare, if not nonexistent. It therefore was the consensus of the Committee that, given the costs involved with government supervision of every strike vote, that the minimal benefits achieved thereby were far outweighed by the expense involved. The Committee could not recommend that the Trade Union Act be amended to provide for government supervised strike votes.

Timing of Strike Vote

The current legislation, because of the different time frames set forth in the Act, leads to somewhat anomalous results. Police officers, employees with the Nova Scotia Power Corporation, firefighters, etc. have a different waiting period than other employees covered by the Trade Union Act. Indeed, there is still some uncertainty as to the meaning of Section 47(3) of the Act:

> "S.47(3) No police constable or officer, and no employee within the terms of subsection (2) of Section 3 of this Act shall strike or participate in a strike until a period of 30 days has elapsed from the expiry of any time during which the strike is prohibited by Section 45."

Although all the members of the Committee agree that there are difficulties arising from the above provisions, the Committee was not able to reach a consensus in regard to any recommendations involving the timing of the strike vote for those classes of workers.

(iii) Vote on Employer's Last Offer

Submissions were received by the Committee expressing the view that in certain circumstances the position adopted by the employer in negotiations was not being clearly communicated to the employees by the union. A number of suggestions were put forward as to methods by which this shortcoming could be met including a mandatory direction that the employer's "final" offer be put to employees, provisions for written communications with employees of this offer, and several other suggestions.

One suggestion concerned the adoption of the Ontario provision found in Section 40 which provides that at any time, but on one occasion only, an employer may put directly to the employees his final negotiating position. If that position is accepted by the employees, it forms the

basis of a collective agreement, and the strike comes to an end. If that position is rejected by the employees, the normal negotiation procedures continue in effect. This particular provision was utilized in a recent strike in the brewery industry in Ontario, with apparent success.

There were concerns expressed by the Committee as to the impact which such a provision might have should it be utilized during the course of a lengthy strike.

Following detailed consideration of this provision, the Committee recommends that a provision for the employer's final offer to be put forward to the union membership, along the same general lines as the Ontario legislation, be adopted but with certain restrictions not found in Ontario.

Principally, the one major difference is that the Committee recommends that the employer shall only have the right to put forward its written offer at any time up to and including the end of the first week of the strike.

When the offer has been forwarded to the Union, it will be presented to the Union membership by the Union and the Union shall be free to make any comments which it might chose in regard thereto in its presentation of that offer to its members.

THE COMMITTEE RECOMMENDS THAT AT THE REQUEST OF THE EMPLOYER, THE EMPLOYER'S OFFER, IN WRITING, WITHOUT COMMENT BY THE EMPLOYER, INCLUDING THE FULL PACKAGE OFFERED BY THE EMPLOYER, SHALL BE PLACED, BY THE UNION, BEFORE THE AFFECTED BARGAINING UNIT. THE COSTS OF THE PREPARATION OF THE WRITTEN OFFER SHALL BE BORNE BY THE EMPLOYER. THE EMPLOYER

MAY MAKE THE OFFER AT ANY TIME UP TO AND INCLUDING THE END OF THE FIRST WEEK OF A STRIKE. THE UNION MUST FORTHWITH PLACE THE OFFER BEFORE THE MEMBERSHIP. THE EMPLOYER MAY EXERCISE THIS RIGHT ON ONE OCCASION ONLY. THIS PROVISION DOES NOT DIMINISH WHATEVER RIGHTS THE EMPLOYER MAY HAVE TO COMMUNICATE DIRECTLY WITH HIS EMPLOYEES DURING A STRIKE.

In other words, the employer on the eighth day after the commencement of a strike, would not be able to put its final offer to the union under this provision if it has not done so prior to that point. Also, the employer would only have the option of placing its final offer on one occasion, and could not make a series of "final offers".

In regard to the content of the proposal put forward in written form, it is the recommendation of the Committee that the actual document be jointly approved by the employer and the union. If there is any dispute in regard to the contents thereof, it shall be resolved by the Labour Relations Board.

THEREFORE THE COMMITTEE RECOMMENDS THAT ANY DISPUTES CONCERNING THE CONTENT OF THE EMPLOYER OFFER, SHALL BE RESOLVED BY THE LABOUR RELATIONS BOARD AS EXPEDITIOUSLY AS POSSIBLE.

3. (F) ESSENTIAL SERVICES

(i) Introduction

A major focus of the discussions of the Committee involved the essential services area. Indeed, a substantial number of members of the Committee were drawn from the management and union sectors of the public sector.

Regretably, although the problems involved in public sector labour relations were discussed at length, very little success was achieved in reaching a consensus in regard to appropriate amendments to the legislation.

In an effort to move this matter forward, a subcommittee consisting of committee members Mr. Boudreau, Mr. Cook, Mr. Blanchard and Mr. Carter was formed to consider the problems of the public sector, with power to add individuals from various other segments of that sector to study the question of essential services.

(ii) Subcommittee Deliberations

This subcommitee subsequently invited a number of other individuals to meet and discuss the difficulties of the public sector. A meeting was held in November, 1985, under the informal chairmanship of a member of the Department of Labour and Manpower.

At this meeting, lengthy discussion ensued, which concluded with an agreement that no consensus could be reached with respect to legislative changes altering the present system. Spokesmen noted their agreement that everyone concerned wished to ensure that the steps taken are adequate when there is a stoppage of service due to a strike or lockout in the field of essential services. The labour component of the subcommittee noted that the past practice was to avoid life-threatening situations and envisaged no departure from such a practice in future.

In subsequent discussions, the subcommittee agreed that it would be worthwhile for parties negotiating collective agreements to develop a mechanism to formalize concerns in individual agreements, but it was noted that this group did not have the ability to develop or insert clauses in all agreements on a universal basis.

The subcommittee concluded their lengthy deliberations by noting that the meeting had been worthwhile and that if future meetings were to be held, the group would contact either Mr. Cook or Mr. Blanchard of the Committee to so advise.

No such additional meetings have been requested to this time.

3. (G) MISCELLANEOUS CHANGES

A number of other suggestions for amendments to the Act came forward which do not fit within any of the above-noted categories. The Committee reached consensus on the following amendments:

(i) Section 20

This provision states that the Board may treat related businesses, etc., as one employer for the purposes of the Act. It had been suggested that it would be useful to delineate the manner in which such an application might come before the Labour Relations Board. Following deliberation, the Committee has agreed to recommend the amendment of Section 20 to clarify those individuals who may apply to have such a declaration made.

THE COMMITTEE RECOMMENDS THAT SECTION 20 OF THE ACT BE AMENDED TO READ AS FOLLOWS:

> **"Where, in the opinion of the Board, associated or related activities or businesses were carried on by or through more than one corporation, firm, syndicate or association, or any combination thereof, under common managmeent or direction, including direction of the work force, the Board may upon application of any person, firm, corporation, trade union or council of trade unions concerned treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purpose of this Act."**

(ii) Section 26

This provision deals with the amendment of certification orders. In addition to the recommendations for amendment considered earlier, a submission to the Committee suggested that an additional category of application be added to the four which are currently set forth in Section 26(1)(a)-(d) of the Act. Specifically, cases arise which require a clarification as to whether individuals fit within the current description of the bargaining unit or whether individuals should be excluded from the unit as currently described. At present, such matters are dealt with through the provisions of applications for amendment of certification, although they do not fit "nicely" into any category contained in Section 26(1)(a)-(d).

THEREFORE, THE COMMITTEE RECOMMENDS THAT SECTION 26(1) OF THE TRADE UNION ACT BE AMENDED TO ADD SUBSECTION (E):

> **"Section 26(1)(e) clarify the description of the unit and any exclusions therefrom."**

(iii) Section 28

This provision deals with agreements between the trade union and an employer whereby the employer grants "voluntary recognition" to the trade union. Currently, Section 28(4) permits a trade union to apply to the Board to determine whether "a trade union represents or represented a

majority of the employees in the unit defined by an agreement made pursuant to this Section". The submission to the Committee indicated that all interested persons should be able to apply to the Board for such a determination.

THE COMMITTEE RECOMMENDS THAT SECTION 28(4) OF THE TRADE UNION ACT BE AMENDED AS FOLLOWS:

> **"Section 28(4) If any question arises whether the trade union represents or represented a majority of the employees in the unit defined by an agreement made pursuant to this Section, the Board or the Panel, as the case may be, upon application by a trade union, employer or any employee affected, shall decide the question and any related question as though the question had arisen in a certification proceeding before the Board."**

(iv) Section 49(8)

Section 49(8) of the Act makes reference to an interim order being made in accordance with Section 49(3) of the Act. This appears to be a typographical error, so that reference should be made to Section 49(2) of the Act wherein the Board is empowered to make such interim orders.

THE COMMITTEE RECOMMENDS THAT THE REFERENCE IN SECTION 49(8) OF THE ACT TO SUBSECTION (3) BE CHANGED TO SUBSECTION (2).

(v) Power to Issue Subpoenas

Currently, a party wishing to have a subpoena issued to compell a witness to attend a Labour Relations Board hearing must have that subpoena signed by a member of the Board. From time to time, this causes difficulties and inconvenience in that a Board member may not be readily available.

The submission to the Committee suggested that this difficulty could be overcome by providing the Chief Executive Officer of the Board with the authority to sign subpoenas. In the opinion of the Committee, this is a sensible administrative change and one which should be acted upon.

THE COMMITTEE RECOMMENDS THAT THE CHIEF EXECUTIVE OFFICER OF THE BOARD BE AUTHORIZED TO ISSUE SUBPOENAS.

4. SUMMARY OF RECOMMENDATIONS

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2.	THE COMMITTEE RECOMMENDS THAT A PREREQUISITE FOR APPOINTMENT TO THE POSITION OF CHAIRMAN OF THE LABOUR RELATIONS BOARD OF NOVA SCOTIA OR VICE-CHAIRMAN OF THE LABOUR RELATIONS BOARD OF NOVA SCOTIA SHALL BE THAT THE INDIVIDUAL HAS LEGAL TRAINING IN THE FORM OF A BACHELOR OF LAWS DEGREE.	17
3.	THE COMMITTEE RECOMMENDS THAT THE LABOUR RELATIONS BOARD SHOULD BE ENCOURAGED TO SIT IN THREE-MAN PANELS IN ORDER TO EXPEDITE THE HEARING OF APPLICATIONS BEFORE THE BOARD.	18
4.	THE COMMITTEE RECOMMENDS THAT THE LABOUR RELATIONS BOARD SHOULD BE ENCOURAGED TO SIT IN THREE-MAN PANELS WHEREVER IT IS POSSIBLE TO DO SO SO THAT TWO OR MORE PANELS MAY SIT AT THE SAME TIME.	18
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9.	THE COMMITTEE FURTHER RECOMMENDS THAT ALL SUCH INDIVIDUALS SHOULD BE "REGULAR" MEMBERS.	22
10.	THE COMMITTEE RECOMMENDS THAT THE POSITION OF CHAIRMAN OF THE LABOUR RELATIONS BOARD SHOULD BE A FULL-TIME POSITION AND THAT THE TERMS AND CONDITIONS OF EMPLOYMENT SHOULD BE SUCH AS TO ENSURE THAT HIGHLY QUALIFIED PERSONNEL WOULD BE WILLING TO TAKE SUCH A POSITION.	23
11.	THE COMMITTEE RECOMMENDS THAT MEMBERS OF THE LABOUR RELATIONS BOARD SHOULD HAVE FIXED TERMS OF OFFICE.	24
12.	THE COMMITTEE RECOMMENDS THAT THE INITIAL APPOINTMENTS OF MEMBERS TO THE BOARD SHOULD BE FOR STAGGERED TERMS OF ONE, TWO AND THREE YEARS WITH SUBSEQUENT APPOINTMENTS BEING ON A THREE-YEAR BASIS.	24
13.	THE COMMITTEE RECOMMENDS THAT CONSULTATIONS TAKE PLACE WITH THE APPROPRIATE ORGANIZATION OR ORGANIZATIONS PRIOR TO THE APPOINTMENT OF MEMBERS TO THE LABOUR RELATIONS BOARD.	25
14.	THE COMMITTEE RECOMMENDS THAT THE CHAIRMAN AND VICE-CHAIRMAN BE APPOINTED FOR AN INITIAL TERM OF FIVE YEARS AND SUBSEQUENTLY HAVE REAPPOINTMENTS FOR THREE-YEAR TERMS. THE TERMS OF THE CHAIRMAN AND VICE-CHAIRMAN SHALL NOT BE COINCIDENT.	25
15.	THE COMMITTEE RECOMMENDS THAT THE BOARD PROVIDE WRITTEN REASONS FOR THEIR DECISIONS WHEN REQUESTED, IN RESPECT TO ANY MATTER WHICH COMES BEFORE IT.	26
16.	THE COMMITTEE RECOMMENDS THAT COMPLAINTS OF UNFAIR LABOUR PRACTICES ARISING UNDER THE UNFAIR PRACTICES SECTION OF THE ACT (SECTION 51-56) OCCURRING DURING AN ORGANIZATIONAL DRIVE (I.E. PRIOR TO A CERTIFICATION VOTE BEING HELD BY THE LABOUR RELATIONS BOARD) SHALL BE HEARD BY THE LABOUR RELATIONS BOARD AS EXPEDITIOUSLY AS POSSIBLE, NORMALLY WITHIN 14 DAYS OF THE FILING OF THE COMPLAINT. THE RESPONDENT SHALL BE INFORMED OF THE SUBSTANCE	28

16. (Continued) PAGE
OF THE COMPLAINT PRIOR TO THE HEARING AND IF NOT SO INFORMED, SHALL BE ENTITLED TO REQUEST AN ADJOURNMENT UNTIL THAT INFORMATION IS PROVIDED.

17. THE COMMITTEE RECOMMENDS THAT COMPLAINTS OF FAILURE TO BARGAIN FILED PURSUANT TO SECTION 33 OF THE ACT SHOULD BE FILED WITH THE BOARD RATHER THAN WITH THE MINISTER OF LABOUR. 28

18. THE COMMITTEE RECOMMENDS THAT THE LABOUR RELATIONS BOARD HAVE THE AUTHORITY TO MAKE DECLARATORY ORDERS IN RESPECT OF THEIR CEASE AND DESIST POWER UNDER SECTION 49 OF THE ACT. 30

19. THE COMMITTEE RECOMMENDS THAT THE TRADE UNION ACT BE AMENDED TO PROVIDE THE LABOUR RELATIONS BOARD WITH THE AUTHORITY TO HEAR APPLICATIONS ALLEGING A BREACH OF ANY PROVISION OF THE TRADE UNION ACT. 31

20. THE COMMITTEE RECOMMENDS THAT THE DEFINITION OF EMPLOYEE SHOULD READ: 33

"'Employee' means a person employed by an employer and includes:

(i) police constables or officials employed by a city, town, municipality or village commission, or board, commission or agency of, or a corporation controlled by, a city, town, municipality or village commission;

(ii) a person employed or engaged on fishing vessels of all types or in the operation of these vessels on water, if he is paid wages or salary or accepts or agrees to accept percentage or other part of the proceeds of the adventure or of the catch in lieu of or in addition to wages."

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21. THE COMMITTEE RECOMMENDS THAT AS A GENERAL PRINCIPLE PROFESSIONALS SHOULD NOT BE EXCLUDED FROM THE PROVISIONS OF THE TRADE UNION ACT SIMPLY BECAUSE OF THEIR PROFESSIONAL STATUS AND THAT SECTION 1(2)(b) OF THE ACT SHOULD ONLY APPLY TO THE MEDICAL PROFESSION. 36

22. THE COMMITTEE FURTHER RECOMMENDS THAT THE ABOVE-MENTIONED PROFESSIONALS SHOULD CONSTITUTE A SEPARATE BARGAINING UNIT AND CONSIDERATION SHOULD BE GIVEN TO THE WORDING FOUND IN THE CANADA LABOUR CODE AT SECTION 125(3): 36

> "Where a trade union applies under Section 124 for certification as the bargaining agent for a unit comprised of or including professional employees, the Board, subject to subsection (2):
>
> (a) shall determine that the unit appropriate for collective bargaining is the unit comprised of only professional employees, unless such unit would not otherwise be appropriate for collective bargaining;
>
> (b) may determine that professional employees of more than one profession be included in the unit; and
>
> (c) may determine that employees performing the functions, but lacking the qualification of professional employees, be included in the unit."

23. THE COMMITTEE RECOMMENDS THAT QUESTIONS CONCERNING THE ELIGIBILITY TO VOTE IN RESPECT OF APPLICATIONS FOR CERTIFICATION AND STRIKE VOTES BE LEFT TO BE DETERMINED BY THE LABOUR RELATIONS BOARD ON A CASE-BY-CASE BASIS. 40

24. THE COMMITTEE RECOMMENDS THAT THE NOVA SCOTIA BOARD IN THE "BUILDUP" SITUATION SHALL GIVE CONSIDERATION TO THE DELAY OF A CERTIFICATION 41

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24. (Continued)
VOTE IF THE CIRCUMSTANCES ARE APPROPRIATE, FOLLOWING THE PRACTICE OF THE ONTARIO LABOUR RELATIONS BOARD. THE PRACTICE OF THAT BOARD IS SET FORTH IN APPENDIX "E" TO THIS REPORT.

25. THE COMMITTEE RECOMMENDS THAT IN AN APPLICATION FOR REVOCATION OF CERTIFICATION CONSIDERATION BE GIVEN BY THE BOARD TO FLUCTUATIONS IN SEASONAL EMPLOYMENT WITH REGARD TO THE TIMING OF A VOTE AND THOSE ELIGIBLE TO VOTE. 42

26. THE COMMITTEE RECOMMENDS THAT THE LABOUR RELATIONS BOARD DEVELOP A COMPREHENSIVE LIST OF "DO'S AND DON'TS" FOR ALL PARTIES DURING THE CERTIFICATION PROCESS WHICH COULD BE POSTED AND SUPPLIED TO ALL PARTIES AS OF THE DATE OF APPLICATION FOR CERTIFICATION. 43

27. THE COMMITTEE RECOMMENDS THAT THE TRADE UNION ACT BE AMENDED TO PROVIDE FOR A SPEEDY PRE-HEARING VOTE WHEN AN APPLICATION FOR AMENDMENT OF A CERTIFICATION ORDER INVOLVES AN ADDITION OF FORTY PERCENT (40%) OR MORE MEMBERS TO THE ORIGINAL UNIT. THE COMMITTEE RECOMMENDS THATTHE VOTE ON INCLUSION BE LIMITED TO THOSE INDIVIDUALS WHO ARE BEING ADDED TO THE BARGAINING UNIT. 45

28. THE COMMITTEE RECOMMENDS THAT EMPLOYERS SHOULD HAVE THE RIGHT TO APPLY TO THE LABOUR RELATIONS BOARD FOR A DECLARATION THAT A CERTIFICATION ORDER HAS BEEN ABANDONED BY A TRADE UNION WHERE THE TRADE UNION HAS NOT SERVICED THE MEMBERS OF THE BARGAINING UNIT IN QUESTION FOR A TWELVE-MONTH PERIOD. 47

29. THE COMMITTEE RECOMMENDS THAT A STATUTORY RAND FORMULA PROVISION, SIMILAR TO THAT FOUND IN THE ONTARIO LEGISLATION, BE INCLUDED IN THE TRADE UNION ACT. 52

30. THE COMMITTEE RECOMMENDS THAT THE GOVERNMENT SHOULD BE URGED TO MAKE AVAILABLE EXPERTISE TO SMALL BUSINESSES FACED WITH TECHNOLOGICAL CHANGE AS TO THE BEST MANNER IN WHICH TO LESSEN THE IMPACT OF THAT TECHNOLOGICAL CHANGE ON ITS EMPLOYEES. 54

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31. THE COMMITTEE FURTHER RECOMMENDS THAT THE TRADE UNION ACT BE AMENDED TO INCLUDE THE FOLLOWING PROVISION: 54

"(A) WHEN A TECHNOLOGICAL CHANGE RESULTS IN OR IS LIKELY TO RESULT IN A LOSS OF EMPLOYMENT OF FIVE OR MORE EMPLOYEES WITHIN A THREE-MONTH PERIOD, THE EMPLOYER AND THE TRADE UNION REPRESENTING EMPLOYEES SHALL, PRIOR TO THE LOSS OF EMPLOYMENT, AND NOT LATER THAN THREE MONTHS BEFORE THE FIRST EMPLOYEE IS LAID OFF, FORM A JOINT COMMITTEE TO DISCUSS THE IMPLEMENTATION OF THE LAYOFF.

(B) IF AN EMPLOYER FAILS TO PROVIDE THE THREE-MONTHS' NOTICE REQUIRED IN SUBSECTION (A) AND CAN DEMONSTRATE, TO THE LABOUR RELATIONS BOARD, THAT TO HAVE SO DISCUSSED THE TECHNOLOGICAL CHANGE WITH THE BARGAINING AGENT WOULD HAVE PLACED THE EMPLOYER AT A COMPETITIVE DISADVANTAGE, THE EMPLOYER SHALL PROVIDE THE EMPLOYEES AFFECTED WITH THREE-MONTHS' WAGES IN LIEU OF NOTICE AND THE EMPLOYER SHALL FORTHWITH MEET WITH THE UNION TO DISCUSS THE IMPLEMENTATION OF THE LAYOFF AND MEANS OF MINIMIZING THE ADVERSE CONSEQUENCES OF THE LAYOFF.

(C) ANY PERIOD OF NOTICE ACTUALLY PROVIDED TO THE EMPLOYEES BY THE EMPLOYER SHALL BE DEDUCTED FROM THE THREE-MONTHS' WAGES IN LIEU OF NOTICE AS PROVIDED IN SUBSECTION (B)."

32. THE COMMITTEE RECOMMENDS THAT THE MINISTER UNDERTAKE AN INDEPTH REVIEW OF THE APPOINTMENT AND TRAINING OF CONCILIATION OFFICERS AND THE PRACTICE AND PROCEDURES OF CONCILIATION SERVICES IN NOVA SCOTIA. 56

33. THE COMMITTEE RECOMMENDS THAT THE TRADE UNION ACT BE AMENDED TO REQUIRE THAT "MEANINGFUL NEGOTIATIONS" HAVE TAKEN PLACE BEFORE THE MINISTER APPOINTS A CONCILIATION OFFICER. 57

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34. THE COMMITTEE ALSO RECOMMENDS THAT ADDITIONS BE MADE TO THE TRADE UNION ACT REGULATIONS REQUIRING THAT BASIC INFORMATION BE SET FORTH IN EVERY APPLICATION FOR CONCILIATION, INCLUDING SUCH INFORMATION AS THE NUMBER OF MEETINGS HELD BETWEEN THE PARTIES, THE CLAUSES UPON WHICH AGREEMENT HAS BEEN REACHED, THE CLAUSES WHICH ARE CURRENTLY OUTSTANDING, AND THE ISSUES BETWEEN THE PARTIES AS VIEWED BY EACH OF THEM. 57

35. THE COMMITTEE RECOMMENDS THAT THE ACT, SECTION 59, BE AMENDED TO PROVIDE FOR THE OPTION OF A ONE-MAN CONCILIATION BOARD, AS WELL AS THE OPTION OF A THREE-MAN CONCILIATION BOARD, EITHER BOARD TO BE APPOINTED ON THE JOINT REQUEST OF THE PARTIES. 57

[AFTER CONSULTATION WITH THEIR CONSTITUENT ORGANIZATIONS, THE MANAGEMENT REPRESENTATIVES DISSENTED FROM RECOMMENDATIONS 36 TO 47.]

36. THEREFORE, IT IS THE RECOMMENDATION OF THE COMMITTEE THAT THE PROVINCE OF NOVA SCOTIA ADOPT A SYSTEM OF EXPEDITED ARBITRATION BASED ON THE ONTARIO MODEL. THE APPOINTMENT OF ARBITRATORS WOULD BE MADE BY A CIVIL SERVANT EMPLOYED IN THE DEPARTMENT OF LABOUR TO BE KNOWN AS THE DIRECTOR OF ARBITRATION. THE DIRECTOR OF ARBITRATION SHALL BE APPOINTED IN CONSULTATION WITH THE JOINT LABOUR/MANAGEMENT COMMITTEE RECOMMENDED TO BE FORMED IN ITEM 5. SUBSEQUENT APPOINTMENTS SHALL ALSO BE MADE IN CONSULTATION WITH THAT COMMITTEE. 60

37. IT IS THE RECOMMENDATION OF THE COMMITTEE THAT THE PROPOSED LEGISLATION CONTAIN PROVISIONS FOR THE APPOINTMENT OF MEDIATION OFFICERS SIMILAR TO THE PROVISIONS FOUND IN ONTARIO. 60

38. THE COMMITTEE RECOMMENDS THAT A PARTY ONLY HAVE ACCESS TO THE PROVISIONS OF THE ACT CONCERNING EXPEDITED ARBITRATION AFTER THEY HAVE EXHAUSTED THE GREIVANCE PROCEDURES FOUND IN THEIR COLLECTIVE AGREEMENT. 61

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39.	THE COMMITTEE RECOMMENDS THAT ANY SYSTEM OF "EXPEDITED" ARBITRATION UTILIZE A SINGLE ARBITRATOR.	61
40.	IT IS THE RECOMMENDATION OF THE COMMITTEE THAT THE ARBITRATOR BE OBLIGED TO MAKE AN ORAL DECISION WITHIN FOURTEEN (14) DAYS FROM THE COMPLETION OF THE HEARING AND THAT THE ARBITRATOR BE OBLIGED TO RENDER REASONS WITHIN THIRTY (30) DAYS FROM THE ORAL DECISION.	62
41.	BECAUSE A SYSTEM OF EXPEDITED ARBITRATION IS A MAJOR NEW DEVELOPMENT IN THE PROVINCE OF NOVA SCOTIA, IT IS THE RECOMMENDATION OF THE COMMITTEE THAT A JOINT LABOUR/MANAGEMENT ADVISORY COMMITTEE BE CREATED TO OVERSEE THE INITIAL START-UP OF A SYSTEM OF EXPEDITED ARBITRATION, TO FORMULATE AN ACCEPTABLE TRAINING PROGRAM FOR POTENTIAL ARBITRATORS, AND TO REMAIN IN PLACE TO ACT AS A "SOUNDING BOARD" TO MONITOR THE FUNCTIONING OF SUCH A SYSTEM.	62
42.	IT IS THE RECOMMENDATION OF THE COMMITTEE THAT THE EXACT MECHANISM FOR THE TRAINING OF ARBITRATORS AND THE FORMULATION OF A PROGRAMME IN REGARD THERETO IS BEST LEFT TO BE DECIDED BY A JOINT LABOUR/MANAGEMENT ADVISORY COMMITTEE FORMULATED FOR THAT PURPOSE.	62
43.	IT IS THE RECOMMENDATION OF THE COMMITTEE THAT THE DECISION OF AN ARBITRATOR SHALL BE FILED WITH THE COURT UPON THE REQUEST OF EITHER PARTY AND UPON SUCH FILING, THE DECISION WOULD BECOME A JUDGMENT IN THE SAME WAY AS A JUDGMENT OR ORDER OF THE COURT AND ENFORCEABLE AS SUCH.	63
44.	IT IS THE RECOMMENDATION OF THE COMMITTEE THAT ARBITRATORS IN NOVA SCOTIA BE GIVEN THE SPECIFIC AUTHORITY TO LOOK TO THE SUBSTANCE OF THE MATTER IN DISPUTE. HOWEVER, THE COMMITTEE NOTES THAT ANY SUCH PROVISION SHOULD NOT EMPOWER THE ARBITRATOR TO MODIFY, ALTER OR AMEND ANY OF THE TERMS OF THE COLLECTIVE AGREEMENT. THEREFORE, THE COMMITTEE RECOMMENDS THE ADOPTION OF WORDING WHICH STATES:	63

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44. (Continued)

"AN ARBITRATOR OR ARBITRATION BOARD SHALL, IN RESPECT OF ANY MATTERS SUBMITTED TO ARBITRATION, HAVE REGARD TO THE REAL SUBSTANCE OF THE MATTER IN DISPUTE BETWEEN THE PARTIES BUT SHALL NOT HAVE THE POWER TO MODIFY, ALTER OR AMEND THE TERMS OF THE COLLECTIVE AGREEMENT."

45. THE COMMITTEE RECOMMENDS THAT THE PARTIES THEMSELVES MAY PROVIDE FOR THE ESTABLISHMENT OF A THREE-MAN ARBITRATION BOARD, ON AN EXPEDITED BASIS, SO LONG AS THE TIME FRAME FOR THE ESTABLISHMENT OF AN ARBITRATION BOARD AS SET FORTH IN THE AMENDMENTS TO THE ACT ARE ADHERED TO. 65

46. THE COMMITTEE RECOMMENDS THAT THE PARTIES TO A COLLECTIVE AGREEMENT WHICH CONTAINS A NAMED ROSTER OF ARBITRATORS SHALL HAVE ACCESS TO THE PROVISIONS OF THE ACT PROVIDING FOR EXPEDITED ARBITRATION BUT THE ARBITRATOR APPOINTED TO HEAR SUCH A CASE MUST BE ONE OF THE ARBITRATORS INDICATED BY THE PARTIES, PROVIDED THAT THE OTHER PROVISIONS OF THE ACT CONCERNING TIME LIMITS CAN BE ADHERED TO IF SUCH INDIVIDUALS ARE APPOINTED. 65

47. THE COMMITTEE RECOMMENDS THAT THE MEDIATION OFFICERS PROPOSED IN RESPECT TO ARBITRATION SHOULD BE SEPARATE FROM THE CONCILIATION SERVICES OF THE DEPARTMENT OF LABOUR AND SHOULD BE UNDER THE JURISDICTION OF THE DIRECTOR OF ARBITRATION. 66

48. THE COMMITTEE RECOMMENDS THAT, AT THE REQUEST OF THE EMPLOYER, THE EMPLOYER'S OFFER, IN WRITING, WITHOUT COMMENT BY THE EMPLOYER, INCLUDING THE FULL PACKAGE OFFERED BY THE EMPLOYER, SHALL BE PLACED, BY THE UNION, BEFORE THE AFFECTED BARGAINING UNIT. THE COSTS OF THE PREPARATION OF THE WRITTEN OFFER SHALL BE BORNE BY THE EMPLOYER. THE EMPLOYER MAY MAKE THE OFFER AT ANY TIME UP TO AND INCLUDING THE END OF THE FIRST WEEK OF A STRIKE. THE UNION MUST FORTHWITH PLACE THE OFFER BEFORE THE MEMBERSHIP. THE EMPLOYER 70

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48. (Continued)
MAY EXERCISE THIS RIGHT ON ONE OCCASION ONLY. THIS PROVISION DOES NOT DIMINISH WHATEVER RIGHTS THE EMPLOYER MAY HAVE TO COMMUNICATE DIRECTLY WITH HIS EMPLOYEES DURING A STRIKE.

49. THE COMMITTEE RECOMMENDS THAT ANY DISPUTES CONCERNING THE CONTENT OF THE EMPLOYER OFFER, SHALL BE RESOLVED BY THE LABOUR RELATIONS BOARD AS EXPEDITIOUSLY AS POSSIBLE. 71

50. THE COMMITTEE RECOMMENDS THAT SECTION 20 OF THE ACT BE AMENDED TO READ AS FOLLOWS: 74

> "Where, in the opinion of the Board, associated or related activities or businesses were carried on by or through more than one corporation, firm, syndicate or association, or any combination thereof, under common management or direction, including direction of the work force, the Board upon application of any person, firm, corporation, trade union or council of trade unions concerned treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purpose of this Act."

51. THEREFORE, THE COMMITTEE RECOMMENDS THAT SECTION 26(1) OF THE TRADE UNION ACT BE AMENDED TO ADD SUBSECTION (E): 75

> "Section 26(1)(e) clarify the description of the unit and any exclusions therefrom."

52. THE COMMITTEE RECOMMENDS THAT SECTION 28(4) OF THE TRADE UNION ACT BE AMENDED AS FOLLOWS: 76

> "Section 28(4) If any question arises whether the trade union represents or represented a majority of the employees

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52. (Continued)

in the unit defined by an agreement made pursuant to this Section, the Board or the Panel, as the case may be, upon application by a trade union, employer or any employee affected, shall decide the question and any related question as though the question had arisen in a certification proceeding before the Board."

53. THE COMMITTEE RECOMMENDS THAT THE REFERENCE IN SECTION 49(8) OF THE ACT TO SUBSECTION (3) BE CHANGED TO SUBSECTION (2). 76

54. THE COMMITTEE RECOMMENDS THAT THE CHIEF EXECUTIVE OFFICER OF THE BOARD BE AUTHORIZED TO ISSUE SUBPOENAS. 77

5. CONCLUSION

The foregoing report merely summarizes in the briefest of capsule form the extensive discussion and consideration given by this Committee to the many matters raised by an extensive review of the Trade Union Act.

The report is deficient to the extent that it does not touch upon those numerous areas which were discussed by the Committee but upon which no consensus was reached. Hence, although all of the suggestions put forward in the submissions to the Committee have not been specifically commented upon, those who have provided such suggestions can rest assured that their proposals were considered but, regretably, no consensus could be developed in regard thereto.

In any broad-based committee of this nature, it is normal that there would be disagreements concerning specifics of various items. As Chairman, I would like to take this opportunity to thank and commend all the members of the Committee for the spirit of cooperation demonstrated in endeavouring to develop the best and most workable legislation possible while at the same time considering and weighing the interests of all parties in the industrial relations field in Nova Scotia.

The members of this Committee consider this report not the end, but merely the beginning of the process of comment and discussion on the current Trade Union Act. It is the hope of this Committee that our recommendations be given due consideration and will form the basis of amendments to the Trade Union Act.

All of which is respectfully submitted this 3rd day of October, 1986.

GREGORY BLANCHARD

GEORGE BOUDREAU

DOUGLAS CARTER

CHRISTOPHER CLARKE

ROBERT COOK

WARREN HORNE

JOHN KANE

BRIAN MATHESON

PETER O'BRIEN

THOMAS PICKFORD

JOHN C. MacPHERSON

FOOTNOTES

1. E.J. Shields, "A History of Trade Unionism in Nova Scotia" (unpublished Master's thesis, 1945, page 6)

2. Ibid, at page 94

3. The Committee would like to thank the research staff of the Department of Labour and Manpower, and in particular Ms. Karen Arbuckle, Librarian, for the research as to the origins of the Trade Union Act.

4. George Adams, Q.C., "Canadian Labour Law, A Comprehensive Text" (Canada Law Book Incorporated, 1985, at pages 59-63)

APPENDIX "A"

LIST OF NEWSPAPERS IN WHICH REQUESTS FOR SUBMISSIONS TO COMMITTEE WERE PLACED

Halifax Chronicle-Herald - January 2 and January 9, 1985

Truro Daily News - January 2 and January 9, 1985

Amherst Daily News - January 2 and January 9, 1985

Cape Breton Post - January 4 and January 9, 1985

New Glasgow Daily News - January 2 and January 9, 1985

The Daily News (Halifax) - January 2 and January 9, 1985

Amherst Citizen - January 2, 1985

Annapolis Spectator - January 2, 1985

Bridgetown Monitor - January 2, 1985

Middleton Examiner - January 2, 1985

Digby Courier - January 2, 1985

Antigonish Casket - January 2, 1985

Berwick Register - January 2, 1985

Bridgewater Bulletin - January 2, 1985

Shelburne Coast Guard - January 2, 1985

Coastal Courier (Cape Breton) - January 2, 1985

Dartmouth This Week - January 2, 1985

Digby Mirror - January 2, 1985

Hants Journal - January 2, 1985

Kentville Advertiser - January 2, 1985

Liverpool Advance - January 2, 1985

Middleton Mirror - January 2, 1985

The Oran - January 2, 1985

Oxford Journal - January 2, 1985

Le Courrier - January 2, 1985

The Pictou Advocate - January 2, 1985

Progress Enterprise - January 2, 1985

The Reporter - January 2, 1985

Springhill/Parrsboro Record - January 2, 1985

Scotia Sun - January 2, 1985

Truro Weekly Record - January 2, 1985

The (Yarmouth) Vanguard - January 2, 1985

Eastern Shore Weekly - January 2, 1985

APPENDIX "B"

LIST OF SUBMISSIONS RECEIVED BY THE COMMITTEE

Canadian Union of Public Employees, Nova Scotia Highway Workers Union, Local 1867

Cape Breton District Labour Council

Capitol Stores Limited

Construction Management Labour Bureau

City of Dartmouth

Halifax Board of Trade

Dan MacDonald

Gilbert MacIntyre

National Sea Products Limited

Nova Scotia Canadian Tire Dealers Association

Nova Scotia Federation of Labour

Nova Scotia Forest Products Limited

Nova Scotia Nurses Union

Oland Breweries Limited

Physiotherapists Organization of Nova Scotia

Police Association of Nova Scotia

Seventh Day Adventist Church

Simpsons Sears Limited

Sobeys Stores Limited

Versa Services Limited

APPENDIX "C"

LABOUR RELATIONS ACT, Stat. Ont. 1980, c. 228, Section 91(8):

> "Where a complaint is made under subsection (1) and the complainant alleges that a strike is imminent or is taking place by reason of the requirement as to the assignment of work or by reason of the assignment of work, the Board may, after consulting any employer, employers' organization, trade union or council of trade unions that in its opinion is concerned, make such interim order with respect to the assignment of work as it in its discretion considers proper."

APPENDIX "D"

Dear Mr. Chairman:

Committee to Review Part I
of the Trade Union Act

During the course of this Committee's review of the Trade Union Act, a recurrent topic of discussion was Section 1(2)(a) concerning the "managerial" and "confidential" exclusions.

In regard to that topic, the members of the Committee discussed in detail their perceptions of the evolving nature of the management structure of various businesses in the current economic climate. In particular, concern was expressed by certain members of the Committee that the "traditional" indicia of management or confidential functions had become blurred with the diffusion of responsibility throughout different levels of the management structure.

Specific examples were the centralization of personnel functions in personnel departments or the increasingly important role of certain individuals in accounting departments in respect of their access to sensitive financial information.

Although there were serious concerns expressed in respect of the current wording of the legislation and various suggestions were made for changes thereto, the Committee could not reach a consensus in respect to either changes in the legislation or the wording of a regulation which would set forth the range of factors which the board should consider in determining whether employees exercised managerial functions or possessed confidential information in relation to labour relations.

However, the Committee considered that it was appropriate that its concerns be brought directly to the attention of the Labour Relations Board. In particular, the Committee would ask that the Board give consideration to reviewing the following factors in respect of any request for the exclusion of an individual from coverage of the Act pursuant to Section 1 (2) (a):

> The degree of conflict of interest encountered by the individual if he or she should be included in the bargaining unit.

The degree of effective control the employee exercises over the employment relationship of other individuals.

The individual's power to hire and fire and make effective recommendations in regard thereto.

The individual's authority to grant or effectively recommend wage increases, promotions, or other similar benefits.

The position of an individual in the hierarchy of the company.

A rational relationship between the numbers of superiors and subordinates in an organization.

Whether an individual participates on behalf of the employer in its grievance procedure.

Whether an individual has the authority to discipline other employees.

Whether an individual attends management meetings at which labour relations are discussed or policy formulated.

The individual's authority to grant time off or assign overtime.

The "prime function" of the individual - either managerial duties or merely as a conduit to pass along decisions of higher management while he spends the majority of his time in the bargaining unit.

The Committee would further urge that consideration be given to the evolving context of managerial styles when the Board assesses the factors.

The Committee would request that you bring this letter to the attention of the other members of the Board.

I would also personally like to thank you for having provided the Committee with the Board's thoughts with respect to various portions of the Act which might be revised.

Yours truly,

John C. MacPherson.

APPENDIX "E"

DEFERRED VOTE WHERE BUILD-UP OF WORK FORCE

Where it is established that the application is premature in that a build-up of the work force is planned which is likely to take place within a reasonable period, the Board generally does not certify or order an immediate vote, but instead defers consideration or orders that a vote be taken at a date when there will be a substantial and representative number of employees at work and for this purpose directs that periodic reports be made to the Registrar. This practice of the Board is an attempt to reconcile the right of persons presently employed to bargain collectively and the right of future employees to select a bargaining agent of their own choice.

However, the Board has strictly limited the circumstances in which a deferred vote will be directed. As stated in the Emil Frant and Peter Waselovich case (57 CLLC 18,057), it must be established that (a) the employees at work do not constitute a substantial and representative segment (usually 50 percent) of the work force to be employed, (b) there is a real likelihood of a build-up within a reasonable period, and (c) such build-up does not depend on factors beyond the employer's control, such as, for example, market conditions. Subsequent Board decisions

reiterate that the employer must have a planned program for the increase of its work force and there must be a real likelihood that the increase will take place within the specified period. The Board will also look at the proportion of projected classifications that are filled at the date of application. Applying these guidelines, the Board has sometimes ordered a deferred vote, and has sometimes refused to do so. The Board bases its assessment of the likelihood of a build-up on circumstances as they exist at the date of the certification application; if, on the basis of such assessment, the Board defers consideration, but the build-up does not proceed as planned, the Board may deal with the matter as of the application date and in proper circumstance issue a certificate.

The Board has refused to accept an agreement of the parties that it was not necessary to defer the application and will on its own motion order a deferred vote where the criteria for doing so are present. As the Board said in Domco Food Services Limited, [1980] OLR Rep. Jan., 33:

> "In every application for certification the Board has a duty to satisfy itself that the applicant trade union commands the support of the required percentage of a representative number of employees. Therefore when the Board is put on notice by a party that there are firm plans to implement an immediate and substantial increase in the work force it may of its own motion apply its normal build-up principles and order a representation vote to be taken when the build-up is far

> enough along that the will of the majority of the employees who will occupy the bargaining unit can be determined. (See McCord Corporation, [1965] OLRB Rep. June 203) By doing so the Board is merely implementing the majoritarian principles fundamental to the granting of bargaining rights under the Act.
>
> Admittedly, neither the Board's form for a union's application for certification nor the employer's reply form contains any question which specifically solicits information about a possible build-up of the bargaining unit. Nor does the Board of its own motion normally make such inquiries at certification hearings. That is not to say, however, that the Board will not do so in appropriate circumstances nor that it will hesitate to reconsider a certification if it should sequentially be disclosed that at the time of the application, whether by ignorance or by design, the parties failed to advise the Board of an impending build-up of which they had knowledge. The Board therefore expects the parties before it in certification proceedings to bring all pertinent information to the Board's attention with the kind of candour exhibited by counsel for the Respondent in this case."

In one case where the Board refused to defer a vote because it was anticipated that the build-up would take too long, but the build-up proceeded more quickly than expected, the Board nonetheless refused to reconsider its decision and order a new vote, since the parties had entered into a collective agreement in the interim. However, in another case on receiving information regarding a build-up which was not available to it at the original hearing, the Board reconsidered and revoked a certificate.

The build-up principle is applied most frequently in cases of plant openings. It does not apply where there is a regular, cyclical fluctuation in the work force, provided that there is a substantial and representative number of employees at work on the application date. In dealing with units which include students employed during the school vacation period, the Board has not permitted a cyclical increase in the number of these students to cause it to defer an application made at some other period. The Board need not and generally does not have regard to any build-up in the construction industry: s. 119(2). In the mining industry, the practice of the Board is to certify in three stages -- during construction, development and production -- so that the employees are not deprived of collective bargaining rights during the period of build-up. [Excerpt from Sack and Mitchell, "Ontario Labour Relations Board Laws and Practice" (1985, Butterworths) at pages 230-233.]

APPENDIX "F"

Ontario Labour Relations Act, Section 45

45. (1) Notwithstanding the arbitration provision in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement may request the Minister to refer to a single arbitrator, to be appointed by the Minister, any difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) Subject to subsection (3), a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after thirty days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

(3) Notwithstanding subsection (2), where a difference between the parties to a collective agreement is a difference respecting discharge from or other termination of employment, a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after fourteen days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

(4) Where a request is received under subsection (1), the Minister shall appoint a single arbitrator who shall have exclusive jurisdiction to hear and determine the matter referred to him, including any question as to whether a matter is arbitrable and any question as to whether the request was timely.

(5) Where a request or more than one request concerns several differences arising under the collective agreement, the Minister may in his discretion appoint an arbitrator under subsection (4) to deal with all the differences raised in the request or requests.

(6) The Minister may appoint a settlement officer to confer with the parties and endeavour to effect a settlement prior to the hearing by an arbitrator appointed under subsection (4).

(7) An arbitrator appointed under subsection (4) shall commence to hear the matter referred to him within twenty-one days after the receipt of the request by the Minister and the provisions of subsection 44(6), (7), (8), (9), (10), (11) and (12) apply, with all necessary modifications, to the arbitrator, the parties and the decision of the arbitrator.

(8) Upon the agreement of the parties, the arbitrator shall deliver an oral decision forthwith or as soon as practicable without giving his reasons in writing therefor.

(9) Where the Minister has appointed an arbitrator under subsection (4), each of the parties shall pay one-half of the remuneration and expenses of the person appointed.

(10) The Minister may establish a list of approved arbitrators and for the purpose of advising him with respect to persons qualified to act as arbitrators and matters relating to arbitration, the Minister may constitute a labour-management advisory committee composed of a chairman to be designated by the Minister and six members, three of whom shall represent employers and three of whom shall represent trade unions, and their remuneration and expenses shall be as the Lieutenant Governor in Council determines.

(11) This section does not apply to a collective agreement in operation on the day this section comes into force but applies to every collective agreement that is renewed or made after that date.

APPENDIX "G"

Manitoba Labour Relations Act

Filing arbitration decision in court.

113.2 Where any party to, or person bound by, a collective agreement fails to comply with a decision of an arbitrator or arbitration board on a matter submitted to arbitration under the collective agreement, any other party to, or other person bound by, the collective agreement may, after the expiration of 14 days from the date the decision is issued to the parties or the date provided in the decision for compliance, whichever is the later, enter the decision, not including any reasons therefor, as a judgment of the Queen's Bench and thereupon the decision may be enforced in the same manner as a judgment or order of the Queen's Bench to the same effect; and the method of enforcing the decision provided under this section is in addition to, and not in substitution for, any other method of enforcing the decision under the law.